CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

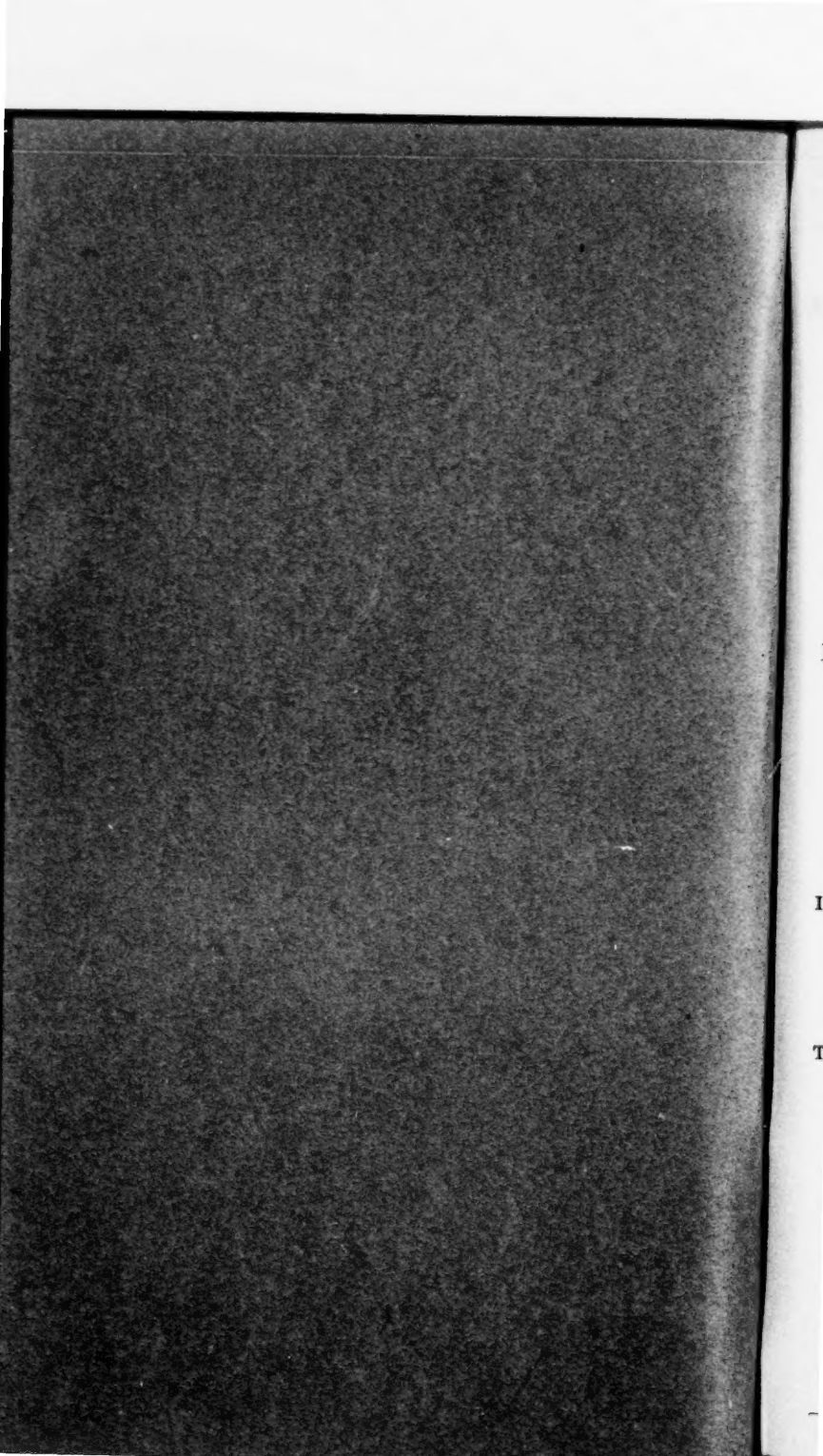
vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED FEBRUARY 4, 1901.

(18,044.)



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1 In the Superior Court of Kittitas County, in and for the State of Wash.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Complaint.

Plaintiff complains of the above-named defendants and for cause of action against them alleges:—

I.

That the plaintiff is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington.

II.

That plaintiff is the owner in fee, and entitled to the possession of the following-described property, to wit: The southeast quarter of section twenty-seven (27), township twenty (20), north of range fourteen (14) east of the Willamette meridian, in Kittitas county, State of Washington.

III.

That the said defendants are now unlawfully in possession of the said premises, and now unlawfully withhold the possession thereof from the plaintiff.

Wherefore plaintiff prays judgment against the said defendants, Peter Nelson and Henry Nelson; first for the recovery of the possession of the said premises; second, for its costs in this action incurred.

F. M. DUDLEY AND
CROWLEY & GROSSCUP,
Attorneys for the Plaintiff.

2 STATE OF WASHINGTON, } *ss:*
County of Kittitas, }

F. M. Dudley, being first duly sworn on oath, says: That he is an officer and agent of the plaintiff, to wit: its western land attorney; that he has read the foregoing complaint, knows the contents thereof and the same is true, as he verily believes.

F. M. DUDLEY.

Subscribed and sworn to before me this 22nd day of April, A. D. 1897.

RICHARD K. BONEY,
Notary Public for Washington, Residing at Spokane.

Filed April 28th, 1897.
E. L. EVENS,
County Clerk.
1—44

3 STATE OF WASHINGTON, } ss:
County of Kittitas, }

I, Wm. Stinson, sheriff of Kittitas county, State of Washington, do hereby certify that I received the annexed summons on the 28th day of April, 1897, and personally served the same on the 29th day of April, 1897, on Peter Nelson and Henry Nelson they being defendants named therein, by delivering to and leaving with each of said defendants personally in Kittitas county, a copy of said summons and therewith a copy of the complaint in the action named in said summons.

Dated this 1st day of May, 1897.

Sheriff's Fees.

Mileage, 90 miles	$9.00
Serving 2	1.20
Ferriage	1.00
	$11.20

WM. STINSON, *Sheriff.*
By C. S. PALMER, *Deputy.*

Filed May 3d, 1897.
E. L. EVENS,
County Clerk.

4 In the Superior Court of the State of Washington in and for the County of Kittitas, Which is Hereby Designated as the Place of the Trial of This Action.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, }
v. } Summons.
PETER NELSON and HENRY NELSON, Defendants. }

The State of Washington to Peter Nelson and Henry Nelson, the above-named defendants:

You, and each of you are hereby summoned to appear within twenty days after service of this summons upon you, exclusive of the day of such service, and defend the above-entitled action in the court aforesaid, and serve a copy of your answer or other pleading on plaintiff's attorney, whose name is subscribed to this summons, at his post-office, address below given, and in case of your failure so to do, judgment will be rendered against you, and each of you, according to the demand of the complaint, which will be filed with the clerk of the said court and a copy of which is herewith served upon you.

Dated this 26th day of April, A. D. 1897.

F. M. DUDLEY AND
CROWLEY & GROSSCUP,
Attorneys for Plaintiff.

Post-office address, Tacoma, Pierce county, Washington.

Filed May 3d, 1897.

E. L. EVENS,
County Clerk.

5 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Answer.

Comes now the defendants in the above-entitled action, Henry Nelson and Peter Nelson, and for answer to plaintiff's complaint,

1.

Deny each and all the allegations in said complaint contained.
For an affirmative defense to said complaint defendants allege,

1.

That in May, 1881, the defendant Henry Nelson, went upon the lands described in plaintiff's complaint, which were at the time unoccupied lands of the United States, that he has ever since said date held and still holds and occupies the said lands under and by virtue of the homestead laws of the United States and is entitled to continue in the peaceable possession thereof.

Wherefore, defendants pray that the prayer of plaintiff's complaint be not granted, and that defendants have and recover of and from plaintiff their costs and disbursements incurred herein.

KAUFFMAN & FROST,
Attorneys for Defendants.

STATE OF WASHINGTON, *County of Kittitas,* } *ss:*

Henry Nelson, being first duly sworn states on oath, that he is one of the defendants named in the foregoing answer, that he has read the same, knows the contents thereof and believes the same to be true.

HENRY NELSON.

Subscribed and sworn to before me this 18th day of May, 1897,
J. E. FROST,
Notary Public.

Residence Ellensburg, Wash.

Filed May 19, 1897.

E. L. EVENS,
County Clerk.

6 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Reply.

Comes now the plaintiff, Northern Pacific Railway Company, and for a reply to the affirmative defense set forth in the answer of said

defendants, Peter Nelson and Henry Nelson, denies each and every allegation of said affirmative defense and answer.

F. M. DUDLEY AND
CROWLEY & GROSSCUP,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Kittitas, }

Thomas Cooper, being duly sworn, upon oath deposes and says, that he is the statutory agent of the Northern Pacific Railway Company, plaintiff in the above-entitled action for the State of Washington, and as such is authorized to make verification of pleadings; that he has read the foregoing reply, knows the contents thereof, and that the same is true as he verily believes.

THOMAS COOPER.

Subscribed and sworn to before me this 19th day of May, 1897.

W. L. SAHSE,
Notary Public in and for Washington,
Residing at Tacoma.

Filed May 20, 1897.

E. L. EVENS,
County Clerk.

7 STATE OF WASHINGTON, } ss:
County of Kittitas, }

In the Superior Court of the State of Washington in and for the County of Kittitas.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* PETER NELSON and HENRY NELSON, Defendants. } Note of Issue and Notice of Trial.

To the clerk of the above-named court:

You will place the above-entitled cause on the trial docket of the above-named court, for hearing on Monday, November 1st, 1897, the same being a regular law day of said court, the day set apart by the court under and provided by the rules of the court for setting causes for trial and hearing issues of law, or as soon thereafter as counsel can be heard, upon the issues of fact raised by the pleadings therein.

The last pleading was served May 20th, 1897, the attorneys for defendant- are Messrs. Kauffman & Frost, Ellensburg, Washington.

CROWLEY & GROSSCUP AND
F. M. DUDLEY,
Attorneys for Plaintiff.

Notice of Trial of Issue of Fact.

To the above-named defendants and to Messrs. Kauffman & Frost, your attorneys:

You are hereby notified that we will, on Monday, Nov. 1st, 1897, the same being a regular law day of said court (the day provided by the rules of said court for setting causes for trial), or as soon thereafter as counsel can be heard, apply to the court in the civil department thereof, to set the above-entitled action for trial, at a time to be fixed by the court, on the issue of fact raised by the pleadings.

Spokane, Washington, October 6, 1897.

CROWLEY & GROSSCUP AND
F. M. DUDLEY,
Attorneys for Plaintiff.

Filed Oct. 28, 1897.
E. L. EVANS,
County Clerk.

8 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
v.
PETER NELSON and HENRY NELSON, Defendants. } Stipulation.

It is stipulated and agreed by and between the parties hereto, by their respective attorneys, that the above-entitled cause shall be submitted and determined by the judge of said court, without a jury upon the following facts, which are, for the purpose of the trial of this cause, admitted and conceded to be true:

I.

That the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

That the said Northern Pacific Railway Company, prior to the commencement of this action, succeeded to whatever right, title, claim or demand the Northern Pacific Railroad Company had, if any, in or to the land described in the complaint herein.

III.

That the N-rthern Pacific Railroad Company, is a corporation created, organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IV.

That by the third section of the said act of Congress, approved July 2, 1864, it was, among other things, provided as follows, to wit: That there be, and thereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to
9 the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections.

That by the sixth section of said act it was, among other things, enacted and provided as follows:

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company as provided in this act."

V.

That the Northern Pacific Railroad Company accepted the terms, conditions and impositions of said act within two years after the passage thereof, and signified such acceptance in writing, under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

10 VI.

That the Northern Pacific Railroad Company fixed the general route of its road extending coterminus with said land, and within forty miles thereof, by filing a plat of such general route in the office of the Commissioner of the General Land Office August 20th, 1873. That thereafter, to wit, November 1st, 1873, the Commissioner of the General Land Office transmitted to the register and receiver of the United States district land office at Walla Walla, Washington Territory, that being the district land office for the district in which said land was then situate, the following letter of instructions:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November 1st*, 1873.

Register & receiver, Walla Walla, W. T.

GENTLEMEN: The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget sound to a connection with their main line near Lake Pend d'Oreille in Idaho Territory, I have caused to be prepared a diagram which is herewith transmitted, showing the forty-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main-line period.

The even sections are increased in price to $2.50 per acre, subject to pre-emption and homestead entry only.

This withdrawal takes effect from August 15, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2nd, 1864, organizing said company.

Be pleased to acknowledge the date of the receipt of this letter.

11 Very respectfully, WILLIS DRUMMOND,
Commissioner.

That said Commissioner transmitted with said letter of instructions the diagram therein referred to, and said diagram and letter were received and filed in the said United States district land office at Walla Walla, Washington Territory, November 17, 1873..

That the land described in the complaint herein was within the forty-mile limit of the land grant as designated in said diagram.

VII.

That prior to December 6, 1884, the said Northern Pacific Railroad Company had definitely located the line of its said railroad coterminous with and within less than forty miles of the land in controversy, and December 8th, 1884, fixed said line of definite location by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and that prior to November 18th, 1886, said Northern Pacific Railroad Company constructed and completed a section of forty miles of the line of its said railroad and telegraph line extending over the said line of definite location and coterminous with the land here in controversy, and the President of the United States having appointed three commissioners to examine the same, and said commissioners having examined the said railroad and telegraph line reported on the 18th day of November, 1886, to the Hon. Secretary of the Interior that said lines were completed in all respects as required by the said act of Congress relating thereto.

That November 30, 1886, the Secretary of the Interior transmitted said report to the President of the United States with a recommendation that said railroad and telegraph line be accepted, and on the

7th day of December, 1886, the President of the United States approved such recommendation.

VIII.

That May 10, 1895, the United States executed and delivered to the Northern Pacific Railroad Company its certain letters patent, under the great seal of the United States, wherein and
12 whereby it purported to convey to the said Northern Pacific Railroad Company the said southeast quarter of section 27 in township 20 north of range 14 east W. M., Washington, under the terms and provisions of the said act of Congress approved July 2, 1864, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IX.

That the defendant Henry Nelson was in the year 1881 qualified to enter public lands under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the various acts supplemental thereto and amendatory thereof.

X.

That in the year 1881 said Henry Nelson, went upon the said southeast quarter of said section 27 in township 20 north of range 14 east W. M., and occupied the same, and has since continually resided thereon.

XI.

That the said land was not surveyed by the United States until 1893.

XII.

That as soon as the said land was surveyed the said defendant Henry Nelson, attempted to enter the same under the homestead laws of the United States in the United States district land office at North Yakima, Washington. That his proffered filing for said land was rejected by the register and receiver of said land office on the ground that said application conflicted with the grant to the said Northern Pacific Railroad Company.

That thereafter the decision of the register and receiver was by the Commissioner of the General Land Office, on appeal, affirmed.

XIII.

That the defendant Peter Nelson is in the occupancy of a portion of the said southeast quarter of section 27, township 20, north of range 14, east, under license from his codefendant Henry Nelson.

F. M. DUDLEY,
Attorney for Plaintiff.
KAUFFMAN & FROST AND
MIRES & WARNER,
Attorneys for Defendant-.

Filed November 15, 1897.

E. L. EVENS,
County Clerk.

13 In the Superior Court of the State of Washington, in and for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Opinion.

This is an action of ejectment.

The facts in this case have been settled by a stipulation between the parties, and show among other things, that prior to December 8th the Northern Pacific Railroad Company, the predecessor in interest to the plaintiff herein, had definitely located the line of its railroad coterminous with, and within less than forty miles of the land in controversy, and on December 8, 1884, fixed said line of definite location by filing a plat thereof, duly approved by the Secretary of the Interior in the office of the Commissioner of the General Land Office, and that prior to November 18, 1886, said company constructed and completed a section of forty miles of the line of said road and telegraph, extending over the line of said definite location and coterminous with the land in controversy in this suit. And that on the 7th day of December, 1886, the President of the United States approved and accepted said complete line of road.

On the 10th day of May, 1895, the United States executed and delivered to the Northern Pacific Railroad Company, its certain letters patent, to the lands in controversy.

It is further shown that the Northern Pacific Railroad Company fixed the gen-al route of its road extending coterminous with said land, and within forty miles thereof, by filing a plat of such general route in the office of the Commissioner of the General Land Office August 20, 1873. That thereafter, to wit, November 1st, 1873, the Commissioner of the General Land Office, transmitted to the register and receiver of the United States district land office at Walla Walla,
Washington Territory, that being the district land office for
14 the district in which said land was then situated, a letter of instructions, which after mentioning the fact of the company's filing its map of general route, directed said register and receiver to withhold from sale or entry all odd-numbered sections falling within the limits of the map of general route as filed not already included in the withdrawal for the main line stating that the withdrawal took effect from August 15, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2d, 1864, organizing said company. Defendant Henry Nelson was in the year 1881, qualified to enter public land under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the various acts supplemental thereto and amendatory thereof.

In the year 1881, said Henry Nelson went upon the land in controversy a portion of an odd-numbered section and occupied the same and has since continuously resided thereon.

Said land was not surveyed by the United States until 1893. As

soon as said land was surveyed by the United States, the said Henry Nelson attempted to enter the same under the homestead laws of the United States in the United States district land office at North Yakima, Washington, his proffered filing for said land was rejected by the register and receiver of said land office on the ground that said application conflicted with the grant to the Northern Pacific Railroad Company, and the decision of the register and receiver was by the Commissioner of the General Land Office, on appeal, approved.

This I think contains all the material facts necessary to a decision in this suit.

The first question to be considered in this case is, to the effect of the issuance of patent for this land, by the United States, to the Northern Pacific Railroad Company. The issuance of a patent by the Government of the United States to the Northern Pacific Railroad Company for the lands earned under its grant does not, I take it, strengthen the company's title to such lands for the reason
15 that under its charter title becomes vested in the company at that moment when it has complied with all the conditions of the grant, and the issuance of a patent is but a perfunctory act on the part of the Government of the confirmation of title already acquired.

That a patent is entitled to the highest consideration by the courts, is not to be questioned. A patent bears upon its face the best evidence of title. And I conceive the rule of law to be, that a patent cannot be attacked collaterally, unless it is as a matter of law absolutely void. The Land Department of this Government has been entrusted with the disposal of the public domain, under certain statutory restrictions, and in that respect they exercise a judicial function. And it has been held in certain instances by the Supreme Court of the United States that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding; but this I believe is as far as the rule extends.

It is always competent, I believe, for the courts to review the action of the Interior Department as to the proper application of the law to the facts so found. And as there is no dispute as to the facts in this case, it is perfectly competent, I think, for this court to inquire into the lawfulness of the issuance of the patent in this case, and to fully determine the rights of the parties to this action under the issues made by the pleadings. This land in controversy being a portion of an odd-numbered section, and within the boundary lines of plaintiff's grant, from the United States, the question arises, did the defendant Henry Nelson acquire such a right to this land, under the land laws of the United States, before the line of plaintiff's road was definitely fixed as would exempt or except said tract of land from the attachment of plaintiff's grant.

The third section of the act of Congress approved July 2, 1864, relative to plaintiff's land grant, reads as follows, "That there
16 be, and hereby is, granted to the Northern Pacific Railroad Company its successors and assigns, every alternate section of

public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claim or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time, any of said sections, or parts of sections shall have been granted, sold, reserved occupied by homestead settlers or pre-empted or otherwise disposed of, other than shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

And by the sixth section of said act it was, among other things, enacted, "And be it further enacted that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed and as fast as may be required by the construction of said railroad: and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company as provided in this act."

There is a line of decisions of the Supreme Court of the United States and of some minor United States courts that, apparently construe section six of the grant as inherently operating to withdraw the lands, within the boundary limits of the grant, from sale, entry, pre-emption, homestead, or acquisition by any means except from the company after the general route of the road is fixed. Denny *vs.* Dobson, 32 Fed. Rep., 909; St. — & P. R. R. *vs.* N. P. R. R. Co., 139 U. S. p. 18; Buttz *vs.* N. P. R. R. Co., 119 U. S., 72, and others.

17 And there are other decisions of these courts that apparently hold that independent of the fact that lands were withdrawn by virtue of the sixth section of the Northern Pacific charter, if they were withdrawn by order of the Secretary of the Interior, the effect of that order of withdrawal was to take them out of the category of public lands upon which rights could be initiated, among which cases are cited Wood *vs.* Beach, 156 U. S. 548, Hamblin *vs.* The Western Land Company, 147 U. S. 531, Spencer *vs.* McDougal, 159 U. S. 62. I have been at times somewhat at a loss to know just what rule to follow in determining these questions. One of the latest utterances of the Supreme Court of the United States on both these questions is found in a well-considered opinion by Justice Harlan in Northern Pacific Railroad Company *vs.* James G. Saunders reported in 166 U. S. p. 620, decided on April 19th, 1897. This case apparently establishes a rule somewhat different from the cases cited above. In his opinion Justice Harlan says: The company acquired by fixing its general route only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific sections until the road was definitely located

and a map thereof filed and accepted. Until such definite location, it was competent for Congress to dispose of the lands on the general route of the road, as it saw proper. Provision for the indemnification of the company in such an emergency, was made by a clause in the act of 1864, providing that whenever prior to the date of definite location "any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof." Again the learned justice says concerning the effect of section six of said act: "The only ground upon which a contrary view can be rested is the provision in the sixth section in the act of 1864 that the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company as provided in this act; but this section is not to
18 be construed without reference to the other sections of the act. It must be taken in connection three, which manifestly contemplated that rights of pre-emption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established. Literally interpreted, the words above quoted from section six would tie the hands of the Government, so that even it could not sell any of the odd-numbered sections of these lands after the general route was fixed, an interpretation wholly inadvisable, in view of the provisions of the third section. The third and sixth sections must be taken together, and so taken it must be adjudged that nothing in the sixth section prevented the Government from disposing of any lands prior to the fixing of the line of definite location." In this case Justice Harlan quotes approvingly from Kansas Pacific Railway Company *vs.* Dunmeyer, 113 U. S. 629–644 as follows: "Referring to the map of general route: We are of the opinion that the duty of filing this map as required by the act like that of definite location, is performed by filing it in the General Land Office and whatever rights accrue to the company from the act of filing it, accrue from filing it there. What are those rights? This does not, like the filing of the line of definite location, vest in the company a right to any specific piece of land. It establishes no claim to any particular section of land with an odd number. * * * The act of filing this map did not withdraw this land from homestead entry." And again Justice Harlan says: "But it is said the lands are therefore to be regarded as agricultural lands that passed to the company under the act of 1864, and were preserved to it by the filing of the map of general route in 1872 and by their withdrawal in that year by the General Land Office, 'from sale or location, pre-emption or homestead entry.' This view overlooks the fact that the expressed declaration of Congress was that no public lands should pass to the company to which, at the time of the definite location of the road, the United States did not have title free from pre-
19 emption or other claims or rights." In Menotti *vs.* Dillon *et al.*, cited by plaintiff in 17 Sup. Ct. Rep. p. 951, decided

May 24th, 1897, construing a land grant somewhat similar to plaintiff's, Justice Gray uses the following language. "It is true as said in many cases, that the object of the executive order withdrawing pre-emption, private entry, and sale lands within the general route of the railroad, is to preserve the lands unincumbered until the completion and acceptance of the road. But where the grant was as here of odd-numbered sections in their certain exterior lines not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed," the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving or otherwise disposing of any of the lands which but for such legislation would have become, in virtue of such definite location, was the property of the railroad company. And again, "The right it acquired, (meaning the railroad company), in virtue of the act making the grant and of the accepted map of its general route, was to earn such of the lands, within the exterior lines of that route, as were not sold, reserved or disposed of, or to which no pre-emptions or homestead claims had attached, at the time of the definite location of its road." In Northern Pacific Railroad Company *vs.* Musser Sauntry Co. 18 Sup. Ct. Rep. 205, decided Dec. 20th, 1897, cited by plaintiff, Justice Brewer in concluding his opinion says: "All that we here hold is that when a withdrawal of lands within an indemnity limits is made in aid of an earlier land grant and made prior to the filing of a map of definite location by a company having a latter grant, the latter having such words of exception and limitations as are found in the grant to the plaintiff, it operates to except the withdrawn lands from the scope of such latter grant." In the same opinion is the following language, "But the language is not simply free from rights, but free from claims and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public, in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road." And such is the general rule in respect to railroad land grants, and cites Railroad Company *vs.* Saunders *supra.*

After giving these cases a careful consideration, I am led to the conclusion that no public lands should pass to the Northern Pacific Railroad Company under its grant, to which, at the time of the definite location of the road, the United States did not have title free from pre-emption or other claims or rights, regardless of the time of fixing the general route of the road, and the subsequent withdrawal of lands within the limits of the grant, from the sale or entry, by the Commissioner of the General Land Office. That being what I conceive the law, the only question remaining is, did the defendant Henry Nelson, before the line of definite location of

the company's road was fixed, acquire such claim or right, to said land as between himself and the Government as would except it from the company's grant. It has been heretofore shown that the line of definite location of plaintiff's road was fixed in 1884; that the defendant Henry Nelson settled on said land in 1881, that the land in dispute was not surveyed by the United States until 1893; that the defendant Henry Nelson settled on said land in 1881 and has continuously resided thereon ever since, and immediately after said lands were surveyed by the United States, attempted to make a homestead filing thereon.

It has been often decided, and I think it is unquestionably the law, that on surveyed public lands no rights can be acquired by mere settlement and residence by a party without filing or attempting to make a filing thereon in the proper land office; as rights to public surveyed lands are not initiated and title from
21 the Government is not acquired in that way. But it seems plain to me that the rule might be different when applied to unsurveyed public lands.

By act of Congress approved May 14th, 1880, it is provided that the settler on unsurveyed lands shall have three months after the filing of township plats, to make entry, and that his rights shall relate back to the date of settlement." In this case defendant Henry Nelson, while this land was unsurveyed, and before the line of definite location of the company's road had been fixed, and after the above act of Congress had been passed and approved, accepting this assurance from the Government, settled upon this land and continuously resided thereon until said land was surveyed by the Government in 1893, a period of twelve years and then in furtherance of his evident original intention attempted to make a homestead filing thereon.

It does seem to me that the mere statement of this claim is conclusive. The above facts being conceded, I am satisfied, as between defendant and the Government, defendant could not be defeated in his attempt to acquire these lands under the homestead laws of the United States. The act referred to above was not an idle expression of Congress. It evidently was passed for a purpose, and has a meaning. And that purpose was to encourage settlement on the unsurveyed public lands and afford legal protection to the settler. It was done to prevent the working of a hardship in just such cases as the one at bar where a man spends the best years of his life acquiring a home in the wilderness. The Land Department of the Government recognizes rights thus acquired by giving a settler credit on his application for a patent, for the time he has resided on the land before it is surveyed. Believing as I do that defendant Henry Nelson acquired a claim or right to the lands in dispute within the meaning of section three of plaintiff's grant before the line of definite location of plaintiff's road was fixed, I give judgment for defendant with costs of suit.

JOHN B. DAVIDSON, *Judge.*

Filed March 22nd, 1898.

E. L. EVENS,
County Clerk.

22 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Conclusions of Law.

This cause coming on for trial before the court upon an agreed statement of facts stipulated by the plaintiff and the defendants herein and the court having examined the arguments of counsel for the defendants submitted herein, and being fully advised in the premises, as conclusions of law, from the facts so stipulated, finds:

I.

That the defendant, Henry Nelson, lawfully holds and occupies the southeast quarter of section 27, township 20 north of range 14, east of the Willamette meridian in Kittitas county, State of Washington, under and by virtue of the homestead laws of the United States, and is entitled to continue in the peaceful possession thereof, and that the plaintiff is not the owner of said lands, and its claim to the possession thereof is without right.

II.

That the defendant, Henry Nelson, is entitled to judgment awarding and continuing him in the possession of said premises, and for his costs and disbursements incurred in this action.

Dated in open court this 24th day of March, 1898.

JOHN B. DAVIDSON, *Judge.*

Filed March 25th, 1898.

E. L. EVENS,
County Clerk.

23 In the Superior Court of Kittitas County, State of Washington.

THE NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Judgment.

This cause coming on to be heard this 22nd day of March, A. D. 1898, upon the motion of Kauffman and Frost, attorneys for the defendants, for judgment in accordance with the conclusions of law, heretofore made and entered herein, and the court being fully advised in the premises grants said motion.

Now therefore, by reason of the law and the premises, it is by the court considered, ordered and adjudged that the plaintiff is not the owner, has no claim and is not entitled to the possession of the southeast quarter of section 27, township 20 north, of range 14 east, of the Willamette meridian; that the defendant, Henry Nelson is now in possession of said premises and entitled to continue in the possession thereof, under and by virtue of the homestead laws of the United States.

And it is further ordered, adjudged and decreed that the defendants recover of and from the plaintiff, The Northern Pacific Railway Company, their costs and disbursements herein, taxed at $20.00.

Dated this 24th day of March, 1898.

JOHN B. DAVIDSON, *Judge.*

Filed March 25th, 1898.

E. L. EVENS,
County Clerk.

24 In the Superior Court of the State of Washington for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Exceptions to Conclusions of Law.

Comes now the plaintiff herein and excepts to the conclusions of law of the court herein, numbered one, and to the whole and every part thereof, upon the ground that it is unsupported by the agreed statement of facts or any fact, and is contrary to law, the evidence and the stipulated facts.

Plaintiff further excepts to conclusions of law numbered two, and the whole and every part thereof, upon the ground that it is not supported by the agreed statement of facts, or any fact, and is contrary to law, the evidence and stipulated facts.

Plaintiff further excepts to said conclusions of law, and each of them, and the whole and every part of each of them, for the reason that they are not supported or founded upon any finding of facts or fact, and the court failed to make any finding of facts.

STOLL, STEPHENS, BUNN & McDONALD,
Attorneys for Plaintiff.

Filed March 26th, 1898.

E. L. EVENS,
County Clerk.

25 In the Superior Court of the State of Washington for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Notice of Appeal.

To the above-named defendants, and to Messrs. Kauffman and Frost, your attorneys:

You and each of you are hereby notified that the above-named plaintiff has appealed and does hereby appeal, to the supreme court of the State of Washington, from that certain final judgment, made and entered in the above-named superior court, in the above-entitled

action, on the 24th day of March, 1898, which said final judgment was and is in favor of defendants and against plaintiff.

STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiff.

The service of within notice of appeal by receipt of a true copy thereof admitted this 18th day of April, 1898.

KAUFFMAN AND FROST,
Attorneys for Defendants.

Filed April 18th, 1898.

E. L. EVENS,
County Clerk.

In the Superior Court of the State of Washington for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Appeal Bond.

Know all men by these presents, that we, the Northern Pacific Railway Company, and E. M. Shaw as surety, are held and firmly bound unto the defendants, Peter Nelson and Henry Nelson, in the sum of two hundred ($200.00), dollars for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, firmly, jointly and severally, by these presents.

The condition of the above obligation is such that, whereas
26 the above-named plaintiff has appealed to the supreme court of the State of Washington, from that certain order and final judgment, made and entered in the above-entitled action, in the above-named superior court, which is in favor of the defendants and against plaintiff, on March 24th, 1898,

Now, therefore, if the above-bounden Northern Pacific Railway Company shall and will pay all costs and damages that may be awarded against it, on the said appeal, or on the dismissal thereof, not exceeding two hundred ($200.00) dollars, then in that event, this obligation to become null and void, otherwise to remain in full force and effect.

Dated this 11th day of April, 1898.

NORTHERN PACIFIC RAILWAY COMPANY,
By STOLL, STEPHENS, BUNN & MACDONALD, *Attorneys.*
E. M. SHAW, *Surety.*

STATE OF WASHINGTON, } ss:
County of Kittitas, }

E. M. Shaw, being first duly sworn, on oath deposes and says: That he is the above-named surety, who executed the above and foregoing bond; that he is a resident of the State of Washington, and is worth the sum of two hundred ($200.00) dollars, over and

above all debts and liabilities, in property within the State of Washington, exclusive of property exempt from execution.

E. M. SHAW.

Subscribed and sworn to before me this 16th day of April, 1898.

E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Due service of within appeal bond by receipt of a true copy thereof admitted this 18th day of April, 1898.

KAUFFMAN & FROST,
Attorneys for Defendants.

Filed April 18th, 1898.

E. L. EVENS,
County Clerk.

27 In the Superior Court of the State of Washington for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Notice and Admission of Service.

To Peter Nelson and Henry Nelson, the above-named defendants, and to Messrs. Kauffman & Frost, your attorneys:

You are hereby notified that the above-named plaintiff has filed in the office of the clerk of the above-named court proposed statement of facts, a copy of which is herewith served upon you; which said proposed statement of facts was filed at four o'clock, p. m. on the 30th day of March, 1898.

CROWLEY & GROSSCUP,
STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiff.

Due and regular service of the above notice and proposed statement of facts heretofore filed in the above-named court in the above-entitled action is hereby admitted, at Ellensburg, Kittitas county, State of Washington, at 4.30 o'clock p. m., on this 30th day of March, 1898.

KAUFFMAN & FROST,
Attorneys for Defendants.

Filed March 31st, 1898.

E. L. EVENS, *Clerk.*

28 In the Superior Court of the State of Washington in and for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Statement of Facts.

The above-entitled action coming on regularly for hearing and trial and a jury being waived by agreement of counsel, and the cause being submitted to the court without a jury upon the agreed statement of facts which facts so agreed upon and stipulated and which are on file in the clerk's office of the above-named court in the above-entitled action were and are in words and figures as follows, to wit:

In the Superior Court of the State of Washington, Holding Terms in and for the County of Kittitas.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Stipulation.

It is stipulated and agreed by and between the parties hereto, by their respective attorneys, that the above-entitled cause shall be submitted and determined by the judge of said court without a jury upon the following facts, which are, for the purpose of the trial of this cause, admitted and conceded to be true:

I.

That the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

That the said Northern Pacific Railway Company, prior to the commencement of this action, succeeded to whatever right, title, claim or demand the Northern Pacific Railroad Company had, if any, in or to the land described in the complaint herein.

29 III.

That the Northern Pacific Railroad Company is a corporation created, organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast by the northern route" and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IV.

That by the third section of the said act of Congress, approved July 2, 1864, it was, among other things, provided as follows, to wit:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections."

That by the sixth section of said act it was, among other things, enacted and provided as follows:

"SEC. —. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry or pre-emption before or after they are surveyed, except by said company as provided in this act."

V.

That the Northern Pacific Railroad Company accepted the terms, conditions and impositions of said act within two years after the passage thereof, and signified such acceptance in writing under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

VI.

That the Northern Pacific Railroad Company fixed the general route of its road extending coterminous with said land, and within forty miles thereof, by filing a plat of such general route in the office of the Commissioner of the General Land Office August 20th, 1873.

That thereafter, to wit: November 1st, 1873, the Commissioner of the General Land Office transmitted to the register and receiver of the United States district land office at Walla Walla, Washington Territory, that being the district land office for the district in which said land was then situate, the following letter of instructions:—

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 1, '73.

Register & receiver, Walla Walla, W. T.

GENTLEMEN: The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget sound to a connection with their main line near Lake Pend d'Oreille in Idaho Territory, I have caused to be prepared a diagram which is herewith transmitted showing the forty-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main line. The even sections are increased in price to $2.50 per acre subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15, 1873, the date when the map was filed by the
31 company with the Secretary of the Interior, as required by the sixth section of the act of July 2nd, 1864, organizing said company.

Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully, WILLIS DRUMMOND,
Commissioner."

That said Commissioner transmitted with said letter of instructions the diagram therein referred to, and said diagram and letter were received and filed in the said United States district land office at Walla Walla, Washington Territory, November 17th, 1873. That the land described in the complaint herein was within the forty-mile limits of the land grant as designated in said diagram.

VII.

That prior to December 8, 1884, the said Northern Pacific Railroad Company had definitely located the line of its said railroad coterminous with and within less than forty miles of the land in controversy, December 8, 1884, fixed said line of definite location by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and that prior to November 18th, 1886, said Northern Pacific Railroad Company constructed and completed a section of forty miles of the line of its said railroad and telegraph extending over the said line of definite location and coterminous with the said land here in controversy and the President of the United States having appointed three commissioners to examine the same, and said commissioners having examined said railroad and telegraph line, reported on the 18th day of Nov. 1886, to the honorable Secretary of the Interior that said lines were completed in all respects as required by the said act of Congress relating thereto. That Nov. 20, 1886, the Secretary of the Interior transmitted said report to the President of the United States with a recommendation that such railroad and telegraph line be accepted, and on the 7th day of December, 1886, the President of the United States approved such recommendation.

VIII.

That May 10th, 1895, the United States executed and de-
32 livered to the Northern Pacific Railroad Company its certain letters patent, under the great seal of the United States, wherein and whereby it purported to convey to the said Northern Pacific Railroad Company the said southeast quarter of section 27, in township 20 north, of range 14 east, W. M. Washington, under the terms and provisions of the said act of Congress approved July 2, 1864, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IX.

That the defendant Henry Nelson was in the year 1881 qualified to enter public lands under the act of Congress approved May 20, 1862, entitled "An act of — to secure homesteads to actual settlers on the public domain" and the various acts supplemental thereto and amendatory thereof.

X.

That in the year 1881 said Henry Nelson went upon the said southeast quarter of section 27, in township 20 north of range 14 east, W. M. and occupied the same, and has since continually resided thereon.

XI.

That the said land was not surveyed by the United States until 1893.

XII.

That as soon as the said land was surveyed the said defendant Henry Nelson attempted to enter the same under the homestead laws of the United States in the United States district land office at North Yakima, Washington. That his proffered filing for said land was rejected by the register and receiver of said land office on the ground that said application conflicted with the grant to the said Northern Pacific Railroad Company. That thereafter the decision of the register and receiver was, by the Commissioner of the General Land Office, on appeal, affirmed.

XIII.

33 That the defendant Peter Nelson is in the occupancy of a portion of the said southeast quarter of section 27, township 20 north, of range 14 east, under license from his codefendant Henry Nelson.

F. M. DUDLEY,
Attorneys for Plaintiff.
KAUFFMAN & FROST,
Attorneys for Defendant.

STATE OF WASHINGTON, }
County of Spokane. }

I, John B. Davidson, judge of and for the superior court in and for the county of Kittitas, State of Washington, and the judge who tried the above-entitled action, do hereby certify that the matters and proceedings embodied in the foregoing statement are matters and proceedings occurring in the foregoing-entitled action, and that the same are hereby made a part of the record therein; that the foregoing statement of facts contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein; that the foregoing statement of facts, matters and proceedings, including all the evidence and facts stipulated, heard or considered by the court, heretofore occurring in the said cause, and not already a part of the record therein.

And I further certify that the foregoing statement of facts was filed less than thirty days after the rendition and entry of judgment in the said cause; that said statement was filed before it was served; that it was served within less than thirty days after entry of judgment; that such service was made in the manner provided by law; that no amendment or amendments or exceptions thereto has been made or filed; that proof of such service has been made and filed in said action.

Done in open court this 27 day of April, 1898.

JOHN B. DAVIDSON, *Judge.*

Filed March 30th 1898.

E. L. EVENS, *Clerk.*

34 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* PETER NELSON and HENRY NELSON, Defendants. } Clerk's Certificate.

STATE OF WASHINGTON, }
Kittitas County, } *ss:*

I, E. L. Evens, clerk of the Kittitas superior court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the records and files in the above-entitled cause as I have been directed by the appellant to transmit to the Supreme Court.

In testimony whereof I have hereunto set my hand and the seal of said superior court this 17th day of June, A. D. 1898.

E. L. EVENS,
County Clerk and Clerk of the Superior Court of Kittitas County, Wash.

[SEAL.]

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
v.
PETER NELSON and HENRY NELSON, Respondents.

No. 3000. Filed May 31st, 1900.

This action was brought by the Northern Pacific Railway Company to recover from the defendants a certain described portion of an odd-numbered section of land situated in Kittitas county, and lying within the place limits of the grant made to the Northern Pacific Railroad Company by the act of Congress of July 2, 1864 (13 Stat. 365). The complaint is in the ordinary form, and alleges the incorporation of the plaintiff, that it is the owner in fee and entitled to the possession of the land described in the complaint, and that the defendants are now unlawfully in possession of the said premises, and unlawfully withholding possession thereof from the plaintiff, and praying judgment against the defendants for the recovery of the possession of said premises, and for costs incurred in this action. The answer of the defendants denies the allegations contained in the complaint, and avers affirmatively that in May, 1881, the defendant Henry Nelson went upon the lands described in plaintiff's complaint, which were at that time unoccupied lands of the United States; that he has ever since said date held, and still holds and occupies, the said lands under and by virtue of the homestead laws of the United States, and is entitled to continue in the peaceable possession thereof. The reply is a general denial of the affirmative matter set up in the answer. The cause was submitted to the superior court upon an agreed statement of facts, and after consideration of the facts agreed upon, and the law applicable thereto, judgment was rendered in favor of the defendants, and the plaintiff thereupon appealed to this court.

It appears from the agreed statement of facts that The Northern Pacific Railway Company, appellant here, is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and that said company, prior to the commencement of this action, succeeded to whatever right, title, claim, or demand the Northern Pacific Railroad Company had, if any, in or to the land described in the complaint herein; that the Northern Pacific Railroad Company is a corporation organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof; that the Northern Pacific Railroad Company accepted the terms, conditions, and impositions of said act within two years after the passage thereof, and signified such acceptance in writing, under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained and on December 29, 1864, served such acceptance on the president of the
36 United States; that the Northern Pacific Railroad Company fixed the general route of its road, extending coterminous

with said land, and within 40 miles thereof, by filing a plat of such general route in the office of the Commissioner of the General Land Office on August 20, 1873; that thereafter, and on November 1, 1873, the Commissioner of the General Land Office transmitted to the register and receiver of the United States district land office at Walla Walla, Wash. T. (that being the district land office for the district in which said land was situated), a letter of instructions, which, omitting date and address, is as follows: "The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line from Puget sound to a connection with their main line, near Lake Pend d'Oreille, in Idaho Territory, I have caused to be prepared a diagram, which is herewith transmitted, showing the forty-mile limits of the land grant along said line, extending through your district; and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main line. The even sections are increased in price to $2.50 per acre, subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2, 1864, organizing said company;" that the said diagram and letter were received and filed in the said United States district land office at Walla Walla, Wash. T., on November 17, 1873; that the land described in the complaint herein was within the 40-mile limits of the land grant as designated in said diagram; that on December 8, 1884, the said Northern Pacific Railroad Company fixed the line of definite location of its railroad by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and that prior to November 18, 1886, the said Northern Pacific Railroad Company constructed and completed a section of 40 miles of the line of its said railroad and telegraph, extending over the said line of definite location, and coterminous with the said land here in controversy; that the President of the United States having appointed three commissioners to examine the same, and said commissioners having examined said railroad and telegraph line, they reported on the 18th day of November, 1886, to the honorable Secretary of the Interior, that said lines were completed in all respects as required by the said act of Congress relating thereto; that on November 20, 1886, the Secretary of the Interior transmitted said report to the President of the United States, with recommendation that such railroad and telegraph line be accepted, and on the 7th day of December, 1886, the President of the United States approved such recommendation; that on May 10, 1895, the United States executed and delivered to the Northern Pacific Railroad Company its patent, wherein and whereby it purported to convey to said company the lands in controversy in this action, under the terms and provisions of the said act of Congress of July 2, 1864, and various acts and joint resolutions of Congress supplemental thereto and amendatory thereof; that the defendant Henry Nelson was in the year 1881 qualified to enter public lands under the act of Con-

gress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and various acts supplemental thereto and amendatory thereof; that in the year 1881 said Henry Nelson went upon the lands in controversy (being the S. E. ¼ of section 27, in township 20 N., of range 14 E., W. M.), and occupied the same, and has since continually resided thereon;
37 that the said land was not surveyed by the United States until 1893; that as soon as the said land was surveyed the defendant Henry Nelson attempted to enter the same, under the homestead laws of the United States, in the United States district land office at North Yakima, Wash.; that his proffered filing for said land was rejected by the register and receiver of said land office on the ground that said application conflicted with the grant to said Northern Pacific Railroad Company; that thereafter the decision of the register and receiver was by the Commissioner of the General Land Office confirmed.

It is conceded that the United States issued its patent to the Northern Pacific Railroad Company for the lands here in controversy, and it therefore follows that the legal title to the land was thereby conveyed to the company. The only question presented in this case for determination is whether the Land Department erred in its construction of the law, in issuing the patent to the railroad company; and it must be conceded that the department did err in so doing, if the land in question was open to homestead entry at the time it was settled upon and occupied by the respondent. It is shown by the agreed statement of facts, as we have seen, that the respondent went upon the land in 1881, and has ever since occupied the same, and that he offered to file a homestead application thereon immediately after the land was surveyed, and the plat thereof filed in the local land office. But it is contended by the appellant that at that time the premises were not subject to homestead entry, for the reason that the land had previously been withdrawn from sale or entry by virtue of the act of July 2, 1864 (13 Stat. 365), and the executive order of November 1, 1873; and after a careful consideration of the cases cited, and all other cases we have been able to discover bearing upon the question at issue, we are constrained to conclude that the contention of the appellant must be sustained. Section 3 of the said act of July 2, 1864, provides as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted,

sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections." By section 6 of said act it was enacted "that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

These provisions of this granting act to the Northern Pacific Railroad Company have been construed by the Supreme Court of the United States in numerous cases, and it seems to us that the question now under consideration has been settled by that tribunal. In Buttz *v.* Railroad Co., 119 U. S. 55, a settler entered upon land on October 5, 1871, with the intent of securing the same under the pre-emption laws of the United States. The land was at that time within the limits of an Indian reservation, the Indian title to which was not extinguished until June 19, 1873. On February 21, 1872, the railroad company filed its map showing the general route of the road, and on March 30, 1873, the land was withdrawn in favor of the company. On the 11th day of August, 1873, and within three months after the Government survey of the land, the pre-emption claimant presented his declaratory statement to the register and receiver of the local land office. The court in that case, referring to the act of July 2, 1864, said: "The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within forty miles on each side, until the definite location is made. The third (sixth) section declares that, after the general route shall be fixed, the president shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall

not be liable to sale, entry, or pre-emption before or after they are surveyed, except by the company." The court, after stating when the general route of the road may be considered as fixed, proceeded, on page 72, as follows: "When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the lands for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless. Nor is there any-
39 thing inconsistent with this view of the sixth section as to the general route in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable." In St. Paul & P. R. Co. *v.* Northern Pac. R. Co. 139 U. S. 1, both parties to the controversy claimed certain land by virtue of a congressional grant. It appeared that the land in controversy had been withdrawn by an order made by the Secretary of the Interior for the benefit of the Northern Pacific Railroad Company, and upon the subject of withdrawal the court said: "Besides, the withdrawal made by the Secretary of the Interior of lands within the forty-mile limit on the 13th of August, 1870, preserved the lands, for the benefit of the Northern Pacific railroad, from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required for the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry, or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unincumbered until the comple-

tion and acceptance of the road." Then, after quoting from the opinion in the case of Buttz *v.* Railroad Co., *supra*, the court further observed: "After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration; nor, indeed, in the absence of its announcement, after the general route is fixed." The same doctrine was announced in the subsequent case of U. S. *v.* Southern Pac. R. Co., 146 U. S. 570. The court in that case expressly approved the language we have quoted from the case of Buttz *v.* Railroad Co. In Wood *v.* Beach, 156 U. S. 548, two orders of withdrawal were made by the Department of the Interior,—one in favor of the Leavenworth, Lawrence & Galveston Railroad Company; the other in favor of the Missouri, Kansas & Texas Railway Company. After these orders of withdrawal were received at the local land office, one Wood made application to enter the land as a homestead; and the court, in considering the effect of those withdrawals, used the following language: "It was said in Wolsey *v.* Chapman, 101 U. S. 755, 768: 'The proper executive department of the Government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in Riley *v.* Welles, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal.' This has been and is the settled rule of the courts and the Land Department. It is only a recognition of the limitations prescribed in the statutes; for by Rev. St. § 2258, 'lands included in any reservation by any treaty, law or proclamation of the President, for any purpose,' are expressly declared to be not subject to the rights of pre-emption, and section 2289, the one giving the right to enter for a homestead, limits that right to 'unappropriated public lands.' The fact that the withdrawals were made by order of the Interior Department, and not by proclamation of the President, is immaterial." In Railroad Co. *v.* Colburn, 164 U. S. 383, the court held that mere occupation or cultivation of premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, did not exclude the tract from the operation of the land grant, and in its opinion said that "frequent decisions of this court have been to the effect that no pre-emption or homestead claim attaches to a tract until an entry in the local land office." And again it is said by the court, in Menotti *v.* Dillon, 167 U. S. 703, 721, in speaking of the effect of a withdrawal order made by the Secretary of the Interior: "That order took these lands out of the public domain, as between the railroad company and individuals, but they remained public lands, under the full control of Congress, to be disposed of by it, in its discretion, at any time before they became the

property of the company, under an accepted, definite location of its road." In Northern Pac. R. Co. *v.* Musser-Sauntry Land, Logging & Mfg. Co., 168 U. S. 604, the same question was presented to the court. In that case certain lands had been granted to the State of Wisconsin to aid in the construction of a railroad, and the same were claimed by the Northern Pacific Railroad Company as part of the grant to it, and in that case the court said: "But a single question is presented in this case, and that is whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864, exempted such lands from the operation of the grant to plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had 'full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed.' The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation. Wolcott *v.* Navigation Co., 5 Wall. 681; Wolsey *v.* Chapman, 101 U. S. 755, and cases cited in the opinion; Hamblin *v.* Land Co., 147 U. S. 531, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent land grants."

41 The rule announced in the foregoing cases was adhered to in the late case of Railroad Co. *v.* Amacker, 20 Sup. Ct. 236. It was there held that homestead entries made prior to the time when notice of withdrawal of the lands is received by the local land office, although after the time when the map of the general route of the railroad was filed in the office of the Secretary of the Interior, were made valid by the act of Congress of April 21, 1876, if the entries were made in good faith by actual settlers upon tracts of not more than 160 acres each, and that they were therefore subject to the provisions of the act of June 15, 1880, authorizing the purchase of such lands by persons who have entered them, or their transferees by *bona fide* instruments in writing. The contest in that case, as stated by the court, was between one claiming under homestead entry and a company claiming under a grant in aid of a railroad; and in the course of the opinion it is said: "They (meaning a majority of the court) are of the opinion that the effect of the act of 1876 was to validate all otherwise regular pre-emption and homestead entries made prior to the time when the notice of the withdrawal was received at the local land office, although such entries were made after the time the map of general route was filed in the office of the Secretary of the Interior, and the order of withdrawal made; that the withdrawal authorized by the sixth section of the act making the land grant to the Northern Pacific Railway Company did not vest in

the company any title to the lands within the withdrawal limits, but only operated, by legislative declaration and subsequent executive action to withdraw those lands from homestead or pre-emption entries." This decision contains the latest expression we have seen of the Supreme Court of the United States upon the question in controversy here, and it will be perceived that it is a virtual reaffirmance of the previous rulings of the court. It is claimed, however, by the learned counsel for the respondent, that a different rule was announced in Railroad Co. *v.* Sanders, 166 U. S. 620, but we do not so understand the decision in that case. The Northern Pacific Railroad Company claimed the lands involved in that action under the grant of July 2, 1864. The company filed its map designating the general route of the road in 1872, and in 1882 filed its map indicating the definite location of its line of railroad; and prior to this latter date certain persons had made application to purchase the land, as mineral land, under the laws of the United States. At the time of the filing of the map of definite location these applications were pending and undetermined, and the court held that these applications constituted a "claim," in contemplation of the act of July 2, 1864, and that the lands so claimed as mineral lands were not included in the grant. It may be said in this connection that the said act of July 2, 1864 especially excluded all mineral land from the grant made to the railroad company; and, of course, the executive orders withdrawing the land from sale or entry did not affect lands not included in the grant. Moreover, the attention of the court in that case was especially directed to the case of Buttz *v.* Railroad Co., *supra;* and in reference to that case the court, at page 636,
42 observed: "On one side, it is said that that case construes the sixth section of the act of 1864 as excluding the possibility of any right being acquired adversely to the railroad company to an odd-numbered section embraced by the exterior lines of the general route after that route had been established. On the other side, it is contended that the only point necessary to be determined, and the only one judicially determined, in that case, was that the defendant could not initiate a pre-emption right to the land there in dispute so long as the Indian title referred to in the opinion was unextinguished. Without stopping to examine these contentions, it is sufficient to say that the Buttz case involved no inquiry as to the respective rights of the railroad company under the act of 1864, and of parties making applications in due form, prior to the definite location of its road, to purchase lands as mineral lands that were within the exterior lines of its general route." We therefore conclude, from the language above quoted, that it was not the intention of the court in that case to overrule the decision in the Buttz case, or subsequent cases announcing the same doctrine.

It is also contended by the respondent that the withdrawal order above set forth did not, in any event, exclude the lands attempted to be withdrawn from the operation of the homestead law, for the reason that the local land officers were directed to withhold all the odd-numbered sections from sale or entry simply; but we think the word "entry" covers homestead applications, as well as what is

generally known as a private entry of lands after the close of public sales. The word "entry" means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim in the appropriate land office." See Denny *v.* Dodson 32 Fed. 899, 910; Chotard *v.* Pope, 12 Wheat. 586.

It is also claimed by the respondent that he had a right to enter the land in controversy, under the homestead laws, by virtue of the act of Congress of May 14, 1880 (21 Stat. 140), which provides that the rights of homestead settlers, like those of pre-emptioners, relate back to the time of settlement. That statute was invoked in Maddox *v.* Burnham, 156 U. S. 544, but the court there held that mere occupation of the public land for the purpose of subsequently entering the same as a homestead, but without actually making such entry until after the lands were withdrawn by order of the Secretary of the Interior, gave the occupant no right thereafter to obtain the title to the land under the homestead laws. For the reasons indicated, the judgment of the court below is reversed, and the cause remanded, with directions to enter judgment for the appellant for the possession of the lands described in the complaint.

ANDERS, *J.*

We concur:
GORDON, *C. J.*
REAVIS, *J.*
DUNBAR, *J.*

43 In the Supreme Court of the State of Washington.

THURSDAY, *July* 5, 1900.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
PETER NELSON and HENRY NELSON, Respondents. } Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Kittitas county and upon the argument of counsel and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing it is now on this 5th day of July A. D. 1900 on motion of Stephens & Bunn of counsel for appellant considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby reversed with costs, and that the said Northern Pacific Railway Company have and recover of and from the said Peter Nelson and Henry Nelson the costs of this action taxed and allowed at seventy-seven and $\frac{15}{100}$ dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

44 Copy.

In the Supreme Court of the United States, December Term, 1900.

PETER NELSON and HENRY NELSON, Petitioners and Plaintiffs in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Respondent and Defendant in Error.

Assignment of Errors.

Comes now said petitioners and plaintiffs in error, Peter Nelson and Henry Nelson by James Hamilton Lewis, their attorney, and for assignment of errors, say that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:—

I.

That the supreme court of the State of Washington committed error in construing the act of Congress of July 2d 1864 and particularly sections three and six of the said act in holding and deciding that by the construction of the said act the Northern Pacific Railway Company was entitled to that certain land situated in the county of Kittitas, State of Washington, known as the southeast quarter of section twenty-seven (27), in township twenty (20) north, range fourteen (14) east, W. M., because and for that

45 II.

And the said supreme court committed error in construing the said act of Congress against the interest, the rights and the claim of petitioners and plaintiffs in error, said Peter Nelson and Henry Nelson, in deciding and holding that the said act should be and is construed to mean that the said claim of the said Nelsons was not well founded and their entry upon the said land did not attach because by construction of the said act of Congress the said entry and claim of the said Nelsons for that to wit, by *the* section three of the act of Congress dated July 2d, 1864, granted all lands designated by said company in their selections notified to the Secretary of the Interior or General Land Office irrespective of the date of the filing of the map of definite route or general location; that as the said petitioners had taken the said land in question subsequent to the date of the respondents' selections though before any filing of the map of definite location or any announcement by said company respondent of its choice in any other way than by communication to the Land Department in letter still the claim of the petitioners did not attach though prior in date to the filing of said map by respondents and on land not theretofore located.

46 Wherefore the said Peter Nelson and Henry Nelson pray that the order and decision herein and in the premises of the supreme court of the State of Washington be reversed and set aside and the said court be directed to enter an order directing the said judgment to be so set aside and judgment entered affirming the decision of the superior court of the State of Washington or reversing

the said cause for further proceedings consistent with the claim and contention of the said petitioners and plaintiffs in error.

JAS. HAMILTON LEWIS,
Attorney for Petitioners and Plaintiffs in Error.

47 In the Supreme Court of the United States, December Term, 1900.

PETER NELSON and HENRY NELSON, Petitioners and Plaintiffs in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Respondent and Defendant in Error.

Know all men by these presents: That we, Peter Nelson and Henry Nelson of the county of Kittitas, State of Washington, as principals and John Nelson and Frank Bossong, as sureties, are held and firmly bound unto the above-named Northern Pacific Railway Company in the sum of two hundred and fifty dollars ($250), to be paid to the said Northern Pacific Railway Company, for the payment of which well and truly to be made, we bind ourselves and each of us our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated the 12th day of September in the year of our Lord 1900.

Whereas, the above-named Peter Nelson and Henry Nelson have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit, given by the judges of the supreme court of the State of Washington for the State of Washington,

Now, therefore, the condition of this obligation is such, that if the said above-named Peter Nelson and Henry Nelson shall prosecute their said appeal and writ of error to effect and answer all damages and costs if they fail to make such writ of error and appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

PETER NELSON.
HENRY NELSON.
JOHN NELSON.
FRANK BOSSONG.

48 Sealed and delivered and acknowledged this 12th day of September A. D. 1900 before me.

J. E. FROST,
Notary Public.

[SEAL.]

Residence, Ellensburg, Wash.

This bond approved by
R. O. DUNBAR,
Chief Justice.

Approved:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

STATE OF WASHINGTON, } ss:
County of Kittitas, }

John Nelson and Frank Bossong being each separately sworn on oath says each for himself and not one for the other, I am one of the sureties who signed the within bond; I am a citizen and resident of Kittitas county in the State of Washington. I am not a sheriff, attorney-at-law or officer of any court. I am worth the sum of two hundred and fifty dollars ($250) in property within the State of Washington over and above my just debts and liabilities, exclusive of property exempt from execution.

JOHN NELSON.
FRANK BOSSONG.

Subscribed and sworn to before me this 12th day of September, A. D. 1900.

J. E. FROST,
Notary Public.

[SEAL.]

Residing at Ellensburg, Kittitas county, Washington.

Indorsed: Filed Sep. 17 1900. C. S. Reinhart, clerk.

49 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Northern Pacific Railway Company, appellant, and Peter Nelson and Henry Nelson, respondents, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said respondents, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to-

gether with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 3000. Filed Oct. 29, 1900. C. S. Reinhart, clerk.

51 In the Supreme Court of the State of Washington.

PETER NELSON and HENRY NELSON, Plaintiffs in Error,
v.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 3000.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above-entitled cause, and that in pursuance of the writ of error heretofore filed in this court from the United States Supreme Court, I herewith transmit such transcript together with the original writ of error, a copy of the assignment of errors and a copy of the bond on appeal to the United States Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 24th day of January, 1901.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 18,044. Washington supreme court. Term No. 44. Peter Nelson and Henry Nelson, plaintiffs in error, *vs.* The Northern Pacific Railway Company. Filed February 4th, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

PETER NELSON AND HENRY NELSON,
Plaintiffs in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondents.

BRIEF OF APPELLANTS.

STATEMENT OF FACTS.

The facts in the above-named cause are, for the purpose of this appeal, "stated." They appear in the transcript as the statement of the case, page ——,etc.

To the point involved the facts are: That Henry Nelson, for the purpose of acquiring a homestead under the laws of the United States, duly settled upon the lands in question, being the south-east quarter of section twenty-seven (27), township twenty (20), north of range fourteen (14). This *bona fide* settlement was made by Nelson in 1881. That said Nelson was qualified to make such settlement for the purposes of said anticipated homestead.

That the respondent company filed its map of definite

location—coterminous with the lands—December 8th, 1884.

That the lands (for the purpose of consummating the homestead or settlement) was not surveyed until 1893. The appellant all the meantime being on and continuing in settlement and possession of said land, improving the same as required by the homestead laws.

That immediately after survey, to-wit, in 1893, the appellant duly made application to perfect his entry in the modes required by law. That the said application was then rejected by the local land office on the sole ground that the said application was in conflict with the grant of the Northern Pacific Railway (Art. XII. of facts). That said Peter Nelson is in the occupation of said land in cotenancy and by consent of the said Henry Nelson.

The Railroad Company brought action in the State Superior Court of the State of Washington against appellant in form of ejectment. Defendant (appellant) denied company's title or right to possession.

The company relies upon the exhibition of a patent, to which there was due reply and issue made contesting the said patent for want of jurisdiction and fraud, mistake of fact and of law. The lower court found for and decided with the claim of appellant. The company appealed to the Supreme Court of the State of Washington and the lower court was reversed and the land awarded to the company. This writ of error is prosecuted from the ruling and final judgment of the Supreme Court of the State of Washington.

The question involved is, who has precedence of possession and right of occupancy to the land—the appellant by reason of his settlement and improvements, or the company by reason of its grant and withdrawals?

The facts of the said grant and withdrawal are:

That the company is successor to the N. P. R. R. Co., which had obtained a grant by the Act of 1864, July 2d.

That by third section of the act the alternate sections were granted—including 40 miles on either side of the road line.

That said grant was accepted *with its* conditions.

That a map of general route was filed in Commissioner's office of general land office, August 20, 1873.

That after December 8th, 1884—the date of the fixing of said definite line, to-wit, May 10th, 1895—while appellant was in possession as settler, claiming said land as homestead, the United States was caused to give patent to said land to the N. P. R. R. Co., *with knowledge on the part of the said government and the railroad* of appellant's claim and rights. (No notice to said Nelson of the application by said company for patent having been given.)

BRIEF OF THE LAW.

I.

When a patent is offered to support a claim of title in the courts of the State of Washington it may by the code procedure and law in effect be assailed as a fraud or having no effect for any other reason.

The State of Washington having blended equity and law relief in one action; particularly in ejectment suits. Such is provided by specific statute. They are quiet title and peace statutes, a procedure of economy, a

policy of the state. Such is, therefore, the law for this court.

St. P. & P. R. R. Co., v. *M. P. Ry.*, 139 U. S., 1-19.

Burfenning v. *C., M. & St. P. Ry.*, 163 U. S., 310-320.

Northern Pacific Ry. v. *Colburn*, 164 U. S., 387.

The law of the State of Washington, beginning with the Territorial legislation, is announced as herewith stated in *Burmeister* v. *Howard*, 1 W. T. Rep., 207, saying in effect that the action of ejectment is to try every question going to make or unmake the title claimed.

The statute of the State is Hill's Code, 530 *et seq.*, and the construction of the same by the State Court as follows:

> " The plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title, to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims, and the superior title, whether legal or equitable, shall prevail.
>
> " *Burmeister* v. *Howard*, 1 W. T., 207. The action is not only to try merely the abstract legal fee to the soil, but to determine who is entitled to the possession, and therefore the holder of the naked fee may not recover, if by his acts, the title be in the adverse party.
>
> " Our statute evidently contemplates that actions for the recovery of real property, but determine the present right of possession, and the verdict, if for the defendant, is that plaintiff is not entitled to possession.
>
> " 2 H. C., 533. The jury by their verdict shall find as follows: . . . 2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property, or part thereof, or license, or right to the possession of either estab-

lished on the trial by the defendant, if any in effect as the same is required to be pleaded.

"A judgment awarding defendant possession of the property in this action, would not be a bar to another action, between the parties affecting the property in dispute, and defendant might bring an action to have the plaintiff declare the holder of the title in trust for defendant, or defendant might move the Attorney General of the United States to begin suit to have the patent issued to plaintiff set aside."

These statutes received the construction herein contended for by the Federal Court sitting in Washington.

Green v. *Tacoma,* 51 Federal, 622-3.

Wherever the code remedies prevail and similar statutes obtain the course herein contended for has been adopted, even in the Federal Courts applying local practice as provided for by the Revised Statutes.

II.

The Land Was Not Withdrawn.

It is contended by the appellant that the land in question was not withdrawn by virtue of the Sixth Section of the Act of 1864, nor by the filing the map of general route, because, as stated in the Act, there was at the time of the designation of the route, "there was land—the same now in question—not free from . . . claims or rights" at the time of the definite location.

The Act does not limit the exemption to a "homestead" or "pre-emption" filing, nor to an accepted claim, but to any land having a *right* to homestead or claim. *We insist that the settling upon in good faith as the necessary condition precedent under the law to filing a homestead created* a claim to homestead; created a right to a filing.

In this connection we are not unmindful of the rulings made by this court, which have been construed as meaning that the "filing" actually by act of the Register, at the instance of the claimant, was necessary to attach a right; also that per dictum that "it is asserted that the offer to pay or the payment of the money required by law was necessary."

Such seems to be the trend of or the construction given on Circuit to:

N. P. R. Co. v. *Coburn,* 164 U. S., 383.
Gonzales v. *French,* 164 U. S., 388.

These have given rise to decisions by Supreme Courts of States and Circuit Courts of United States, sustaining in part the views contended for by defendant in error. *Nevertheless,* and despite these views, we respectfully insist that this court, having in view, more lately pointed out, how inequitable it was to say that a settler could not obtain rights until he filed—knowing that he could not file until survey—and that because the railroad company could between an honest settlement and the opportunity of filing, to wit, the survey by the Government, an act in point of time the settler could not control—that the road could file a map—an act over which the settler could exercise no prohibition, and from these the settler must lose his home, be denied the benefits of the very things the law created as a condition upon which a free home should vest—this court noted that such course would work a fraud and deny, not effect, the very purpose of the law. So this court more lately has declared the meaning of the words in the Act of the N. P. grant, to wit, "claim or right to mean what it says, a *right* to the home; a right by virtue of the honest acts done, to wit, *residence* and *improvement* with honest intent, all done in ignorance of the future to be made claim of the company.

Therefore the more humane and equitable doctrine is the one now obtaining, as announced by this court, to wit:

> "In connection with Section 3 of the Act (1864) which manifestly contemplated that rights of pre-emption or *other claims* or *rights* might accrue or become attached to the land *after the general route was fixed* and before the line of definite location was established."

Railroad Co. v. *Sanders,* 166 U. S., 636.

The Act does not define the right. Therefore in equity it means "a *right* which would be right to recognize and equitable to enforce."

> "The filing of the map of general route gave the Railroad *no claim to any specific lands within the exterior limits of such route* on either side of the road . . . and *title does not attach* to specific sections until they are identified by an *accepted* map of *definite location* of the line of road to be constructed."

Menotti v. *Dillon,* 167 U. S., 720.

N. P. v. *McCormick,* 94 Fed., 936.

Therefore, with an honest settlement for homestead purposes, an honest improvement, preceding the filing of the accepted map of location gave a *preceding right* to the settler. Such, we insist, gave and established a "lawful claim" upon the land in controversy. It was a "right" or claim of right as contradistinguished to claims *attached* (which latter word is not in the section now referred to).

Menotti v. *Dillon,* 167 U. S., 722.

Grubbs v. *U. S.,* 105 Fed., 314.

III.

Now, let it be borne in mind that the only act of the government by Congress in favor of the company was anterior to the settling upon the land by the appellant. That the *only conduct* which gave the company the benefit of the act was done *subsequent* to appellant's entry upon the land as a settler. We insist, therefore, that no declaration or promulgation by the department officer could affect these rights of the settler theretofore attaching to him. Particularly where the granting act of Congress reserved no such power or privilege in such administrative officer.

Northern Pacific R. R. v. *Smith*, 171 U. S., 269.
N. P. v. *Sanders*, 166 U. S., 636.
(See authorities cited under point IV.)

Conceding for argument that in construction of acts using the word "attached" referring to homestead, preemption or other rights, this court meant generally to say an actual filing, referring to the definition of the word *"attached"* as given by Mr. Justice Miller in *Dunneyer* v. *Road*, 113 U. S., 629, reading:

> " Section 4 of Act 1864 (Kans., etc. Act). Every alternate section, etc. . . . to which a preemption or homestead claim may not have *'attached'* at the time the line of the road is definitely located." (Quotation from Dunneyer case, page 630.)

Same situation in Central Pacific granting acts.
Also those relating to Minnesota lands.

Yet we must not overlook the duty to construe the words of these acts in the most limited manner possible so as to give the settler the greatest opportunity to enjoy the object and purpose of the acts. *Tarpey* v. *Madsen*, 178

U. S., 219. So no word can be construed into the act when apparently purposely omitted. *Sioux City, etc., R. R.* v. *U. S.*, 159 U. S., 349. The word "attached" as used in the early Minnesota and Union Pacific, Kansas and Iowa and Nebraska grants had been construed to mean as the court say—a *filing*—an act that attached by the *thing* the land to the claimant. This construction though true to the word "attached" was apparently false to the fair purpose of its intended meaning. So in the later act 1864 of the N. P., in section three the word "attached" *as theretofore used is omitted. It is not necessary under that section that the right or claim to the land should have "attached."* It is only required to have existed, though wholly unattached. So the words of the opinion in *Colburn* v. *N. P.*, 164 U. S., 389, can have no application to an act or section omitting the word "attached."

The words of section three of the Act of 1864 are:

> "*Free* from . . . any claim (claims) or rights at the time the line of the road is definitely located." (See Sec. 3, Act Cong., 1864.)

This exceptive manner of statement differing from the acts using the words rights or claims "attached" is meaningful and is sufficient to establish that the words "free from . . . claims or rights" mean free from any *claim of right or right of claim* to the land.

Nor. Pac. R. R. v. *Musser Sauntry*, 168 U. S., 608-609.

This latter construction as given by this court is a practical departure upon reason from previous views to the contrary. It is time and the gradual unfolding to the sense of justice the purport of these granting acts measured by the duty of the government to the settler and his rights which has constrained the honest conscience of

courts to change views, heretofore expressed. Note the words of the late Justice Field in *Barden* v. *N. P.*, 145 U. S., p. 543, saying:

> " Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in the Leavenworth case; . . . and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that in the absence of any express provision indicating otherwise (to illustrate, the word "attached"—parentheses by brief writer) a grant of public lands *only applied to lands which are* FREE *from existing claims* is better and safer, both to the government and to private parties."
>
> *N. P.* v. *McCormick*, 94 Fed., 938-9.

The settlers' rights by the Act of Congress, May 14, 1880, relate back to time of his settlement. 21 Statutes at Large, page 140.

Says Mr. Justice Peckham for the court in *N. P. Ry. Co.* v. *Lacey*, 172 U. S., page 635:

> " We would say that if there were at the time of the filing of the map of definite location an *actual existing claim, even though it might turn out to be wholly unfounded, the land thus claimed would not pass by the grant.*"

IV.

THE ORDER OF WITHDRAWAL OF NOVEMBER 1, 1893.

If it be contended that the order of withdrawal of November 1, 1893, operated to segregate the land in question, let it be answered by the words of the order and its legal weight.

First. No order made by the Commissioner could be effective indiscriminately holding up land anywhere from

entry. The law is that the land attaching to the N. P. could only so happen when definite map of location had been filed and ACCEPTED.

S. P. R. R. v. *U. S.* (C. C. A.), 109 Fed., 921.
U. S. v. *O. & C. Ry.*, 176 U. S., 28, 43, 46.

The mere filing general route only indicated for the company's purpose the line through and to which it would ultimately file its map, taking along such route now suggested such land which may be *free* from claim at the time of the filing of the map of definite location.

N. P. Ry. Co. v. *Musser-Launtry Co.*, 168 U. S., 608, 609.
Menotti v. *Dillon*, 167 U. S., 720.
N. P. Ry. Co. v. *McCormick*, 94 Fed., 939.

This court has inclined to treat such order as of no value or most limited in its effect, being contrary to the purpose of the law and inconsistent with the spirit of the granting acts.

Hewett v. *Schultze*, 180 U. S., 139, etc.
Powers v. *Slaght*, 180 U. S., 173.
So. P. Ry. v. *Bell*, 183 U. S., 675.

V.

If it be contended that the action of the Land Department in granting patent to company, without notice to claimant, the Government and the company, having knowledge of claimant's entry and possession by the proceeding of contest of date, 93 and 94 (referred to in par. XII of stated facts), is final, and cannot in its error of fact and error of law be assailed in a proceeding properly lodged in the tribunal where the matter of error by the

law of the forum is triable. We answer that such contention is opposed to the settled rulings on the point.

Whitney v. *Taylor,* 158 U. S., 85, etc.
N. P. v. *Colburn,* 164 U. S., 286.
Menotti v. *Dillon,* 167 U. S., 719.
United States v. *N. P. Ry.,* 95 Fed., 864.

VI.

Tendering of Money. Filing Fee.

It is urged as further matter in support of title by the company and in opposition to appellant's claim that the record does not show the tendering of the money for filing, the Government price. We deny this contention.

First. We contend that such was not necessary in the absence of the word "attached." See *infra.*

That the words attached contemplated an active filing and of course money was to be paid, or tendered, if one rested upon rights through a *filed claim,* or by reason of one which needed to be filed to be substantial or preferred. We insist that where the "rights" or "claims" are any part of an equitable cognizance, the rule as to payment which can apply to but one *state of claim,* pre-emption or homestead filing, has no application.

See authorities cited *infra.*

Record Shows Money Must Have Been Tendered.

Second. However, admitting, for the sake of argument, that the matter of the tendering of the filing fees or government price is relevant here, the record nowhere shows the *absence of such.* The record, Statement of Facts, par. XII, shows and concludes the fact, that the claimant after occupying the land from 1881, in 1893 "attempted to enter the same under the homestead laws."

That his proffered filing was rejected *because said application conflicted with the grant of the road.* It is the common-sense law that all matters which in contemplated legal form are presumed to precede a judicial or quasi judicial determination did so precede. So the attempt to enter under the homestead laws can only be made in full meaning of the phrase by tendering the legal amount and offering the filing. This is the definition of attempting to enter under the homestead law following settlement.

Therefore the evidence naturally and legally deducible from the *only thing* before the court and logical and natural to indulge, is that the money was tendered.

Smith v. *U. S.*, 170 U. S., 377-378.

The *proof* is that the record shows that the "attempt to enter was denied and application rejected because" the same conflicted with the grant of the Northern Pacific Road. If the money had not been tendered the rejection would have been on that ground.

The giving the one reason assumed that all things necessary to reach that far, to wit, to the precedence of grants or filings, had been done.

Where one deed is offered as title and rejected because subsequent to another deed in point of sovereignty, such assumes two deeds. To have a contending deed, calling for ruling upon superiority of rank, the elements making a *deed* are accorded the instrument, to wit, consideration passed, and delivery. So the filing of the claimant is, on the record, shown to have been accompanied by all the law assumes to have existed before the conclusion of rank of filings could be adjudged by the tribunal having such to do.

M., K. & T. Ry. v. *Cook,* 163 U. S., 491.
Carr v. *Fife,* 156 U. S., 495.
Barden v. *N. P.,* 154 U. S., 1138.

THE LAND UNSURVEYED.

But keep in view the land at the time of settlement was unsurveyed; no filing could be made. When surveyed the filing was held to be impossible because of the intermediate filing of company's map. So the question of fees is irrelevant and immaterial.

N. P. R. R. Co. v. *McCormick,* 94 U. S., 941.

COMPANY ESTOPPED. NOT QUALIFIED TO RAISE QUESTION OF NON-PAYMENT.

Conceding the matter of fees to be paid government, the part consideration for the land, relevant and material, *it is only so to those who would have a right* to collect the same, the government.

Smith v. *U. S.,* 170 U. S., 377-378.

The matter of actual going in and upon the land by the settler goes to the question of the right of possession; opens the question of right to claim the same. The matter of paying the money due, being a part consideration, the co-operative with settlement and improvement, this goes to the question of perfection of possession, or title absolute. This can only be a matter for the grantor, the person to whom the money is owing—to whom it is due.

Van Wyck v. *Knevals,* 106 U. S., 360.

Is it not Hornbook law to every country lawyer defending ejectment suits, that a grantee in a subsequent deed can not claim over a superior deed because the grantee in the superior deed has not paid the consideration to his grantor? This is an independent debt, may be waived by the grantor, forfeited or lapsed. It is no concern of the second holder of a deed. The second holder does not have the equities of the original grantor, nor can

he dare assert anything under him without bringing him into court to assent thereto.

The government could refuse Peterson a patent for not having paid his consideration, but so long as it was silent, the contending claimant resting only on claim of prior legal possession can not urge such default of payment. It was no duty owed or broken to him (it), the company.

U. S. v. *N. P. Ry.*, 95 Fed., 864.

Grinnell v. *Railroad*, 103 U. S., 739.

The other familiar illustration is before us: A buys land, agrees that before entering he will pay the taxes or a mortgage. A enters, does not pay either. B gets a deed, claims the land. B can not claim any advantage because A did not pay the taxes or the mortgage. This concerns only the State, which may relinquish, or the mortgagee, which may abandon or extend. So, too, could the government waive the payment or default.

U. S. v. *N. P. Ry. Co.*, 95 Fed., 864.

These are conditions running with the full enjoyment of title as against the grantor, not conditions defeating the entry upon the possession and the perfection of the title.

Smith v. *U. S.*, 170 U. S. (cited.)

Says this court, referring to similar contention as made by respondent herein:

> ". . . a private property owner was no party to the contract between the State and the Federal Government, and stood in no position to take advantage of a default of the State, in respect to its contract. His rights were entirely subsidiary to those of the government and if the latter chose to acquiesce in the abandonment of the canals he had no right to complain."

Walsh v. *Columbus etc. Ry.*, 176 U. S., 469, etc.

VII.

If it be contended that by a remedial Act of Congress of January 1st, 1898, the Northern Pacific Railway succeeded to the rights of the N. P R. R.. then we are brought to the sole question, what were the "rights"' of the N. P. R. R. at that date (January 1st, 1898) to be conferred on the N. P. Ry., so far as the present contention is involved.

The decisions of this court, which this court will recognize judicially, show that in 1895 the N. P. R. R. passed into insolvency. It became lifeless. It ceased its existence by a sale under receiver. At that date the N. P. R. R. had no further capacity to carry out initiated proceedings whether in land office or elsewhere to obtain title depending on continuous performance under its grant. Therefore at the N. P. R. R.'s death there ceased to conflict with Nelson's claim any contending proceeding. The grantee in the Congressional grant was dead and no (heirs) successors had been by the Act anticipated as a result of such death. This left the Nelsons the only occupant of or claimant against the government for the land.

The Northern Pacific Railroad's "rights" were in this land *nil.* These rights granted referred only to such as were not lost by the conditions existing or lapsed by the situation. The "rights" of the N. P. Ry. refer to future acquirable ones, *not the power to resuscitate dead ones* or supplant enuring ones to make place for intruding ones. The N. P. P. Ry. Co. therefore got no rights under the act from the N. P. R. R. The N. P. R. R. had none to this land at the date of the remedial or granting act in controversy. By the death of the company the land *unearned* lapsed to the Government save so far as claimed

by a settler. That the Government could give the land to the N. P. Ry. is admitted—though questionable—by the Act of 1898, but not as against a settler's claim quieted by the death of a contestant against a common grantor. See:

24 Statutes at Large, 556.

29 Statutes at Large, 42.

U. S. v. *Flint Ry., etc.*, 95 Fed., 551.

The purchasers at the receiver's sale took only what could be given by decree, the tangible legal assets, and the equitable ones only so far as such purchaser could "take." No such purchaser at receiver's sale was constituted by the Act of 1864 as the successors of the N. P. R. R. The word successors in the Act means its *congressionally created successors.*

U. S. v. *Flint, etc., R. R. Co.*, 95 Fed., 551 and 558-9.

EXEMPTION AND CONFIRMATION TO APPELLANT BY ACT 1887 TO ADJUST LAND GRANTS.

By Section 5 of said Act it is provided that land "sold" is protected; then follows that all land shall be exempted from the section which is under honest claim or *bona fide occupation* of adverse claimants for . . . or homestead.

This section construed with the purpose of the law confirmed to the roads free all land not sold, or which then were not in *bona fide* occupation for . . . homestead purposes. The latter is taken from claim of the roads and transferred to occupant by the Act, if occupant was such before 1882. See:

Act March 3rd, 1889, 24 Stat., 557.

U. S. v. *Holmes,* 105 Fed., 46-7-8.

Manley v. *Low,* 110 Fed., 245, 247 (where claimant was in possession as homesteader).

ACT OF CONGRESS, 1898 (JANUARY 1ST), GAVE LANDS TO CLAIMANT (APPELLANT).

The Act of 1898 under which respondent claims "rights" to land claimed by N. P. R. R. for the purpose of settling disputes at that date and protecting settlers, by fair construction grants the said land in controversy to the claimant. The company accepted the Act, therefore its provisions and effect. The Act recompenses company for any land claimed by settler and not voluntarily abandoned to company by allowing it lands in lieu of such. (See Act.) Now the company is remitted under the Act to lien lands in place of these claimed by claimant. The land by the Act is confirmed to claimant.

30 Statutes at Large, 620, c. 546.

Humbird v. *Avery,* 110 Fed., 466 (saying):

By that act . . .

> "As to those purchasers or *settlers* who elect to retain their claimed lands, the railroad *grantee* or its *successors* . . . may take lien lands therefor and the relinquished lands *revert* to the U. S. and stand as if never included in the grant, and the controversies about them are ended."

The effect of this Act does not depend on any conduct of the land office.

Humbird v. *Avery,* 116 Fed., 468-9.

The settlement, possession and improvement by the claimant was the existence of and the assertion of a "valid claim" (*Thallman* v. *Thomas* (C. C. A.), 111 Fed., 277; *Tarpey* v. *Madsey,* 178 U. S., 219), holding, in effect, that the failure of the Government to survey or do other

things to give opportunity to file cannot be concluded against the settler and his rights thereby affected—if he is an honest settler in good faith.

We respectfully insist that appellant is entitled to the land; that the judgment of the Supreme Court of the State of Washington is erroneous; that same ought be reversed, and order made by this court directing decree in favor of appellant with proper costs and other relief.

Respectfully submitted,

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No. 44.

Reply Br. of Lewis & Co.

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OCTOBER TERM, 1902.

No. 44.

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vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

REPLY BRIEF OF APPELLANTS.

JAS. HAMILTON LEWIS,
Attorney for Appellants.

(18,044.)

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REPLY BRIEF OF APPELLANTS.

The answering brief of defendant in error clings to the single hope drawn from the alleged "order" of the Commissioner of the General Land Office of November 1, 1873.

In the words of Polonius to Hamlet—

"Still harping on my daughter."

Now, this order is conclusively answered by reference to the order and the law.

I.

By the granting act to the Northern Pacific railroad (section 3) the provision is that "there is granted to the Northern Pacific railroad * * * land free, etc., * * * *at*

the time the *line* of the said road is *definitely fixed*" (*i. e.*, by filing map of definite location).

Then the Secretary may designate the selections, etc.

By section 6 it is the survey *only* to follow general route. The odd sections then to be not subject to entry, etc., all *as may* be required by *the construction of said* road.

Let it be noted that these withdrawals permitted by section 6 are depending on the necessity caused by the actual construction. It is the process of construction that *alone* calls for such withdrawal.

Therefore there can be no construction—" as fast," etc., or otherwise—except on the line of definite location. The location of the definite route must have been decided on and accepted before *construction* could begin or the Government know where *construction* is to be undertaken. So such withdrawals can only be in contemplation of a map of *definite* location having been filed.

Therefore the order of the Commissioner making withdrawals upon the filing of the *general route*, when the law is that such could only be done upon filing *definite location*, conveys nothing, is without jurisdiction, is wanting in jurisdictional premise, is a void thing against rights properly attaching.

If a court should order property released from attachment upon filing bond, properly approved, and the clerk should order the property released before such filing of bond and the approval of the same, will any one contend successfully that a process of execution upon an inferior judgment could attach to the property in precedence to the first attachment because of such improper and non-jurisdictional release by the administrative officer of the court—the clerk? Preposterous!

II.

We insist that the wisdom of the Sanders case (166 U. S.), is justified by the object of the law and is peculiarly fitting to the facts of the case at bar.

III.

Counsel for defendant in error seek to avoid the benefits to appellant arising from his settlement and residence by claiming that the record is silent—bare—fails to show for what purpose Nelson settled on the land. Counsel for company is in error. The record has failed to impress him with its recitals.

1st. The presumption of the purpose to acquire a homestead will be indulged.

Tarpey *vs.* Madsen, 178 U. S., 215.

2d. The answer of appellants' (defendants in lower court) affirmative defense, paragraph I, "that he (Nelson) held and (from said date) still holds and occupies said lands under and by virtue of the homestead laws of the United States, and is entitled to * * * peaceful possession."

Transcript, page 3.

See also paragraph IX and X, statement of case.

Transcript, page 8.

See finding and opinion of judge of superior court (Transcript, page 14), finding purpose of settlement to acquire a homestead.

Also see page 15, Transcript, finding to the same effect, paragraph I.

IV.

The answer is attempted to be made to the contended-for effect of the acts of 1887 (page 17, opening brief of appellants) and act 1898 (page 18, brief of appellants).

With reference to the main brief of appellants, this is most respectfully submitted.

JAS. HAMILTON LEWIS,
Attorney for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

v.

THE NORTHERN PACIFIC RAILWAY COMPANY.

Reply by Plaintiffs in Error to Supplemental Brief of Defendant in Error.

ARGUMENT.

The incorporation of the act of 1898 as printed in defendant's supplemental brief omits material portions of the act, as evidenced by comparison with the act itself.

See 30 Stat. at Large, 620, c. 546.

The contention under the act by appellants is not "new" in the sense of not being appropriate for appellate court because not raised in lower court.

1st. It was not passed when the lower court heard the cause.

2d. It was a *law*, an act of Congress, at the time of the decision of the supreme court of the State, and as such was entitled to the proper consideration as a law of such force as its provisions created.

3d. It is a granting act specifically addressed to the defendant; the act by which its rights must be adjudged—also the rights of the appellant.

4th. It is one of the sources of title of the appellant and naturally is producible under allegation of title made by appellant affirmatively, and is a limitation on the title claimed by the defendant, which must stand on the strength of its own title.

Seligman *v.* Burgess, 103 U. S.

The facts must be kept in view to appreciate the relationship of this act:

In 1872 the order was made upholding all lands within the limits of general route.

This was void, as opposed to the act of Congress and in violation of the law granting land only on filing map of definite location.

This order was therefore not in pursuance of any statute and was a void thing.

Hewett *v.* Schultze, 180 U. S., 139, etc.

Powers *v.* Slaght, 180 U. S., 173.

The land on "general route" was still open to claims and settlement.

See Sanders *v.* Road, 166 U. S., cited.

N. P. *v.* McCormick, 94 Fed., cited.

In 1881 appellant became a settler in good faith on the land for homestead purposes.

In 1884 the defendant filed for first time its map of definite location, after the "claim and right" of appellant had arisen and existed.

In 1893 the land for the first time was surveyed.

"Immediately thereafter" appellant tendered his appropriate filing. It was rejected. Appeal was taken to General Land Office. Contest for the said land still continuing.

On May 10, 1895, while appellant was in possession under congressional grant of homestead to him, a settler, and with notice of his claim, possession, and contesting position, all of which *antedating* filing map of *definite location*, defendant company took patent, founded on presumed grant by order of General Commissioner upon a filing a general route, and despite the possession and claim of appellant and the attaching to appellant of his homestead, antedating the filing map of definite location.

Thus there was ever a contest—against the road—first, by attempt to file—a contest against the patent by continued possession from proper and anterior date—an existing assertion of right to property despite void patent—issued without jurisdiction.

The Northern Pacific railroad's patent, under these circumstances, conveyed nothing, or at least was only a color of a doubtful title. When Northern Pacific Railway Company sought a congressional subrogation to the rights of the Northern Pacific railroad, it for the first time asked to be made the "successors" of the Northern Pacific railroad.

The Congress could, therefore, qualify this new recognition, or thus for the first time grant to the Northern Pacific

railway, by such conditions as would quiet every form of "existing claim by a *bona fide* settler," add the duty to the company to take all hands off any then contending settler—contending on any ground if in *bona fide* possession—and confirm this settler's claim, particularly so when the patent was issued *subject* to such claim under the facts. This Congress did. It gave title to Northern Pacific railway for first time by congressional grant, and therewith granted unconditionally to *settler* the land he was on.

The company is rewarded for such loss by being given other *unsettled-upon* lands.

The granting act of 1898 by its passage vested such rights as it conveyed to the company, also by the passage and acceptance by the company vested the land in the settler which was under a claim by a *bona fide* settlement.

The Secretary of the Interior is only called on to act *when the company* informs him that the settler still claims and holds on the land. The settler has not to come in and try a case and prove his right. If so, why the act making the possession *bona fide* alone sufficient for title, and the clinging to the land by remaining on it sufficient for the company as a basis to obtain compensation in other lands.

This is the construction of the court construing the act.

Humbird *v.* Avery, 110 Fed., cited.

The construction *ex parte* of the Land Office is of no judicial value. Its construction in a case—the same that was overruled by the Federal court taking jurisdiction of the identical subject is neutralized as a precedent. It is *nil.*

The construction must follow the object of the act.

It was to give any settler the land he had *bona fide* settled

on previous to filing map of definite location, patent or no patent, contest or no contest, and in turn for this absolute grant for peace, economy, and general right in equity.

The company is given land lien—whether coterminous or not coterminous—whether earned by them or not earned by them, providing the same is *unoccupied* and *unclaimed*.

The act gives appellant the land, irrespective of other questions submitted.

JAS. HAMILTON LEWIS,
Attorney for Plaintiffs in Error.

The attempted effort to give effect to a construction of this act in defiance to its purpose by the land officers presents to the writer of this brief the grotesqueness of the serious law.

No one between earth and heaven more than the writer could know as a fact what was intended by the use of certain words in this act.

It fell as the public duty of the writer of this brief to personally prepare and insert those words in the act. But as this court is not a foreign tribunal accepting the expert opinion of the author of a law, it can only recur to the debates of Congress to ascertain what was the atmosphere attending the passage of this law to gather the intent of the act. We therefore cite House Journal, May and July, 1898, subject, Civil Sundry Law.

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No. 44.

Brf. of Bunn v Kerr for Def'g.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

v.

THE NORTHERN PACIFIC RAILWAY COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

C. W. BUNN and
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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

v.

THE NORTHERN PACIFIC RAILWAY COMPANY.

Argument for Defendant in Error.

STATEMENT.

This case is before the court on a writ of error to the supreme court of the State of Washington. The action was brought by The Northern Pacific Railway Company, defendant in error here, to recover possession of part of an odd-numbered section of land lying within the place or granted limits of the grant to the Northern Pacific Railroad Company by act of Congress of July 2, 1864 (13 Stat., 365).

The supreme court of Washington held, reversing the trial court, that the railway company was entitled to recover. The case was tried without a jury upon an agreed statement of facts, contained in the record (Trans., pp. 19–22), from which it appears as follows:

By section 3 of the Northern Pacific granting act it was provided:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections."

By section 6 of this act it was provided:

"*And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of

the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

The Northern Pacific Railroad Company fixed the general route of its road opposite the land in controversy and within forty miles thereof by filing a plat of such general route in the office of the Commissioner of the General Land Office on August 20, 1873 (Trans., p. 20); thereafter, and on November 1, 1873, the Commissioner of the General Land Office transmitted to the officers of the district land office for the district in which the land in question was situated a letter of instructions withdrawing the land from entry. This letter is as follows:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *November* 1, 1873.

"*Register and Receiver, Walla Walla, W. T.*

"GENTLEMEN: The Northern Pacific Railroad Company having filed in this Department a map showing the general route of their branch line from Puget sound to a connection with their main line near Lake Pend d'Oreille, in Idaho Territory, I have caused to be prepared a diagram, which is herewith transmitted, showing the forty-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main line. The even sections are increased in price to $2.50 per acre, subject

to pre-emption and homestead entry only. This withdrawal takes effect from August 15, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2nd, 1864, organizing said company.

"Be pleased to acknowledge the date of the receipt of this letter.

"Very respectfully,

"WILLIS DRUMMOND,
"*Commissioner.*"

(Trans., p. 21.)

The letter and the diagram there referred to were received at the district land office on November 17, 1873 (Trans., p. 21). The land in question was situated within the forty-mile limits of the land grant as designated on this diagram (Trans., p. 21). On December 8, 1884, the Northern Pacific Railroad Company fixed the line of definite location of its railroad opposite the land in controversy by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office (Trans., p. 21), and prior to November 18, 1886, the railroad company completed a section of forty miles of its line of railroad coincident with its line of definite location, opposite the land in question, and the road so constructed was duly accepted as provided in the act (Trans., p. 21). The line of definite location and construction was within forty miles of the land in question, and the land therefore fell within the place or granted limits (Trans., p. 21).

On May 10, 1895, the United States executed and delivered to the Northern Pacific Railroad Company its patent, whereby it conveyed the premises in controversy in

pursuance of the provisions of the granting act (Trans., p. 22).

Before the commencement of the action the Northern Pacific Railway Company succeeded to the title of the Northern Pacific Railroad Company in the premises (Trans., p. 19).

After the withdrawal on general route, and in the year 1881, Henry Nelson, one of the defendants below, went upon the lands in controversy, and has since resided thereon (Trans., p. 22). Nelson was then qualified to enter public lands under the homestead law of the United States (Trans., p. 22). The land was surveyed by the United States in 1893, and thereupon Henry Nelson made application to the district land officers to enter the land as a homestead under the laws of the United States, but his filing was rejected upon the ground that it conflicted with the Northern Pacific grant. The decision of the district land officers was affirmed by the Commissioner of the General Land Office (Trans., p. 22). It appears that Peter Nelson is occupying the premises under license from Henry Nelson (Trans., p. 22).

It was held by the supreme court of Washington that the Interior Department was right in rejecting the homestead application of Henry Nelson, for the reason that the land was not subject to entry when he made his settlement thereon or when he offered his filing.

ARGUMENT.

It is submitted that the decision of the supreme court of Washington is correct, both under the decisions of this court and under the settled construction of the Interior Department.

The State supreme court held that upon the fixing of the general route of the Northern Pacific railroad, in 1873, and the issuance of the order of withdrawal by the Commissioner of the General Land Office the land in question was no longer subject to homestead entry.

In *Buttz v. Northern Pacific Railroad Company*, 119 U. S., 55, it appeared that a pre-emption filing had been offered for lands within the place limits of the Northern Pacific grant after the map of general route had been filed and an order of withdrawal issued thereon and before the line was definitely fixed. This court said:

"The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or pre-emption of the adjoining odd sections within forty miles on each side until the definite location is made. The third (sixth) section declares that, after the general route shall be fixed, the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd

sections granted shall not be liable to sale, entry, or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the Department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove useless. Nor is there anything inconsistent with this view of the sixth section as to the general route in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable."

In *St. Paul and Pacific R'd Co. v. Northern Pacific R'd Co.*, 139 U. S., 1, this court again considered section 6 of the Northern Pacific grant and the effect of an order of with-

drawal on general route made under its provisions. The court said:

"Besides, the withdrawal made by the Secretary of the Interior of lands within the forty-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road. * * * After such withdrawal no interest in the lands granted can be acquired against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed."

To the same effect is *United States v. Southern Pacific R'd Co.*, 146 U. S., 570.

In *Northern Pacific Railroad Co. v. Amacker*, 175 U. S., 564, this court had before it for construction the act of Congress of April 21, 1876, which validated certain entries theretofore made, and had occasion to consider also the withdrawal on general route under the Northern Pacific grant.

The court said:

"They (the majority of the court) are of the opinion that the effect of the act of 1876 was to validate all otherwise regular pre-emption and homestead entries made prior to the time when the notice of the withdrawal was received at the local land office, although such entries were made after the time the map of general route was filed in the office of the Secretary of the Interior, and the order of withdrawal made; that the withdrawal authorized by the sixth section of the act making the land grant to the Northern Pacific Railway Company, did not vest in the company any title to the lands within the withdrawal limits, but only operated by legislative declaration and subsequent executive action to withdraw those lands from homestead or pre-emption entries."

In Hewitt *v.* Schultz, 180 U. S., 139, this court considered the validity of an executive order withdrawing indemnity lands within the Northern Pacific grant from entry after definite location. The Interior Department had undertaken, as in the case of all other grants, to withdraw indemnity lands, but in 1888 it was held by Secretary Vilas in the case of *Guilford Miller*, 7 *Land Decisions*, 100, that this authority did not exist. This ruling of Secretary Vilas was followed by Secretary Smith in *Northern Pacific Railroad Company v. Davis*, 19 *Land Decisions*, 87, and thereafter remained the settled construction of the Department. This court affirmed the construction placed on the granting act by the Interior Department, and it is important to observe the grounds of the conclusion thus affirmed. The Department held that the granting act did not contemplate a withdrawal of indemnity lands after definite location for two reasons: (*a*) That the withdrawal of

lands in the forty-mile limits on general route, prescribed by section 6, was intended to be exclusive of any other withdrawal, and (*b*) that section 6 in terms forbade a withdrawal of indemnity lands after definite location.

It therefore follows that if the Department was correct in its first reason assigned for the conclusion thus affirmed by this court the validity of the withdrawal on general route must be conceded.

As before stated, the action of the Interior Department in rejecting Nelson's application upon the ground that when he made his settlement, in 1881, the land had been for many years withdrawn from entry is in accordance with the construction of the Department placed on this and similar grants. This construction has been unchanged from the beginning.

Northern Pacific R'd Co. *v.* Presser, 2 Land Decisions, 551.

Northern Pacific R'd Co. *v.* Guilford Miller, 7 Land Decisions, 100.

McClure *v.* Northern Pacific R'd Co., 9 Land Decisions 155.

Northern Pacific R'd Co. *v.* Collins, 14 Land Decisions, 484.

Central Pacific R'd Co. *v.* Beck, 19 Land Decisions, 100.

Northern Pacific R'd Co., 27 Land Decisions, 505.

Southern Pacific R'd Co., 30 Land Decisions, 247.

The plain reading of section 6 of the Northern Pacific granting act cannot leave room for construction, and neither authority nor precedent is required as a basis for the con-

clusion that after the general route was fixed the lands in the forty-mile limits were set apart to aid in the construction of the road, the title to pass when the line should be definitely located. If this was not the purpose of section 6 its enactment was an idle thing, and the location of the general route before the filing of the map of definite location involved a useless expenditure of time and money.

If the filing of the map of general route and the issuing of the order of withdrawal by the Commissioner of the General Land Office was contemplated by the granting act, the Interior Department and the court below were manifestly right in holding that Nelson acquired no right by virtue of his occupancy and that the patent was rightfully issued to the railroad company. The decisions of this court are uniform that no rights can be acquired under the public land laws to lands withdrawn.

Wolsey v. Chapman, 101 U. S., 755.

Wood v. Beach, 156 U. S., 548.

Northern Pacific R'd Co. v. Musser-Sauntry Land, etc., Co., 168 U. S., 604.

The argument urged on the court below in answer to what has been said was based on the decision of this court in *Northern Pacific R'd Co. v. Sanders*, 166 U. S., 620. It was insisted that in that case this court denied that the withdrawal on general route was effectual for any purpose. It seems clear, however, that the contention is based on a misapprehension. In the Sanders case it appeared that the Northern Pacific Company filed its map of general route in 1872 and its map of definite location in 1882, and that between those dates certain persons had made

application to purchase the land in controversy as mineral land, under the laws of the United States. When the Northern Pacific granting act was passed on July 2, 1864, there was no statute in force under which a mineral claim could be initiated, but in 1866 Congress passed an act declaring the mineral lands open to exploration and occupation by citizens of the United States. This court held that the applications to enter the lands as mineral lands were properly received, notwithstanding the withdrawal from pre-emption and homestead entry, and that no inquiry could be allowed as to the mineral or non-mineral character of the lands against which such claims were of record, and that, since they existed at definite location, the lands were excepted from the grant. The court said, on pages 634–'5:

"Until such definite location it was competent for Congress to dispose of public lands on the general route of the road as it saw proper."

In *Menotti v. Dillon*, 167 U. S., 708, a tract of land was in controversy that had been withdrawn on general route under the grant for the benefit of the Central Pacific Railroad Company. After the general route had been fixed and the land withdrawn, the State of California, by its agent, selected the tract in lieu of land excepted from the grant to the State for school purposes. July 23, 1866, before definite location of the line of railroad, Congress passed an act confirming this selection. The court quoted from its opinion in the Sanders case and then said:

"It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry and sale lands within the general route of a railroad is to

preserve the lands unencumbered until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines 'not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed,' the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States *by legislation*, at any time prior to the definite location of the road from selling, reserving, or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company."

It seems clear that the court did not intend by its decisions in the two cases last cited to overrule its previous long line of decisions and change the settled construction of the Interior Department, but intended merely to hold that, until definite location, lands within the withdrawal limits of a railroad grant are still within the disposing power of Congress.

The court will not overrule the construction placed upon acts of Congress by the executive officers of the Government charged with their administration, except for cogent reasons or unless that construction is manifestly erroneous.

United States v. Johnston, 124 U. S., 236.

United States v. Alabama Great Southern Railroad, 142 U. S., 615, 621.

Hewitt v. Schultz, 180 U. S., 139.

But in any event the plaintiffs in error have not shown that any such claim had attached to the land at the date of definite location as would be sufficient to except it from the

grant, even if it should be held that the withdrawal on general route was ineffectual to reserve the land from homestead entry. The record fails to show under what circumstances or for what purpose Henry Nelson settled on the land. The record contains the bare statement that he has occupied the tract since 1881. This court has held in *Northern Pacific R'd Co. v. Colburn*, 175 U. S., 564, and *Tarpey v. Madsen*, 178 U. S., 215, that mere occupancy at the date of definite location is insufficient to except land from a railroad grant.

It is also urged by the plaintiffs in error, for the first time in this court, that the act of July 1, 1898 (30 Stat., 620), confirms the claim of Henry Nelson and renders voidable the patent issued to the Northern Pacific Railroad Company. An examination of the act of 1898 shows that it was enacted for the sole purpose of settling controversies between the railroad company and settlers within its grant where the claim of the railroad company was based, in the words of the act, "on definite location or selection" and the claim of the settler was based upon settlement or purchase from the United States. It was provided that controversies of this nature were to be settled in the Interior Department in the manner provided in the act—by a relinquishment of such claim by one party or the other. It was manifestly not contemplated that where a contest had been terminated and a patent issued to the railroad company the title so confirmed should be clouded, and the land rendered unsalable, by extending to such lands the operation of the act.

There is submitted herewith the circular of instructions issued by the Interior Department under the act of 1898, and immediately following its passage, from which it is

clear that no such construction as that urged by plaintiffs in error is recognized.

It is also suggested by plaintiffs in error that the Northern Pacific *Railway* Company is not entitled to maintain this action as the successor of the Northern Pacific Railroad Company. The successorship, so far as this land is concerned, is conceded in the record (Trans., p. 19). The instructions issued under the act of 1898, *supra*, show further that this successorship is recognized by the United States.

It is submitted that the judgment of the supreme court of Washington should be affirmed.

C. W. Bunn and
James B. Kerr,
Counsel for Defendant in Error.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

Supplemental Brief for Defendant in Error.

The argument for plaintiffs in error urges that by reason of the provisions of the act of Congress of July 1, 1898 (30 Stats., 620), the claim of the plaintiff in error Henry Nelson is confirmed. The text of the act is as follows:

"That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided.

the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey: *Provided, however*, That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest Government subdivisions; and all right, title, and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner here-

inbefore provided, lands in lieu of those relinquished, and patents shall issue therefor; *Provided, further*, That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron or coal; *And provided further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor; *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company, as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, and nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted: *And provided further*, That all qualified settlers, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-

eight, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their *bona fide* residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this act."

The first answer to this argument is that the contention is urged for the first time in this court. In *National Bank vs. Commonwealth*, 9 Wall., 353, 363, this court said:

"We have so often of late decided, that when a case is brought before us by writ of error to a State court, we can

only consider such alleged errors as are involved in the record, and actually received the consideration of the State court, that it is only necessary to state the proposition now. As the question thus sought to be raised here was not raised in the court of appeals of Kentucky, we cannot consider it."

See also *Insurance Company vs. Mordecai*, 24 How., 117.

But if the court shall reach the question of the construction of the act and its application to this case, it is submitted that the case is not within its terms. The act is manifestly a remedial measure, having for its object the amicable adjustment of pending controversies to lands within the limits of the Northern Pacific grant. In the case of all such controversies it offers first to the settler or purchaser from the United States the option of electing to retain the disputed land or to relinquish it and transfer his claim to other public land of equal area. In the event that the settler or purchaser elects to retain the land, it then becomes the duty of the Secretary of the Interior to include the land in a list to be furnished to the company and to request a relinquishment thereof, and upon such relinquishment by the company it, in turn, becomes entitled to select in lieu an equal quantity of public land. It is manifest that the provisions of the act could not have been forced upon the company against its will, and that any acceptance on its part must have been purely voluntary, for where it had acquired vested rights they could not have been taken away by Congress; and the object of the legislation being plainly to afford an opportunity for the adjustment of differences between the company and settlers, it is not reasonable to suppose that Congress intended that it should apply to controversies that had been successfully waged by the company in the Interior

Department and which had culminated in the issue of patents to the company as in the case under consideration, nor would Congress anticipate that the company would feel impelled by way of compromise to relinquish lands that had been thus finally awarded to it.

Indeed the language of the act clearly negatives this construction, for in defining the classes of cases contemplated by its provisions it includes not lands owned by the company or patented to it, but lands *claimed* by it "by definite location or selection." On the other hand, when specifying the interest of the adverse party necessary to bring a case within the operation of the act, it includes lands settled upon in good faith or purchased from the United States prior to January 1, 1898. If the act should be construed to include lands patented to the company, it is plain that it would cast a cloud on the title of every acre of patented land within the Northern Pacific grant, for the only proof necessary to defeat such a patent would be proof that prior to January 1, 1898, the land had been occupied by a settler in good faith. It is doubtful if subsequent abandonment would defeat the settler's right or cure the patent; certainly a temporary absence with evidence of intention to return would not prevent the application of the act. The result of this construction would be that the title to any tract of land patented to the company would not be determined by record evidence, but would rest solely upon parol—a result opposed to the settled policy of the law relating to land grants.

Kansas Pacific Railway Company vs. Dunmeyer, 113 U. S., 629.

Whitney vs. Taylor, 158 U. S., 85.

Southern Pacific Railroad Co. vs. De Lacey, 174 U. S., 622.

The construction contemplated by plaintiffs in error is sought to be sustained by the decision of the circuit court for the district of Minnesota in *Humbird vs. Avery*, 110 Fed., 465. In that case a suit in equity was brought by certain grantees of the Northern Pacific Railway Company against certain settlers on lands within the grant to whom patents had been issued to hold them trustees of the legal title. The circuit court held that the effect of the act of 1898 was to confirm the title of the settlers to whom these patents had been issued. This case went upon appeal to the circuit court of appeals for the eighth circuit, and the question whether the act of 1898 applies even to lands patented to settlers is now before this court on certificate from the court of appeals, being No. 382 on the calendar for the present term. Whether the circuit court was right in applying the act of 1898 to lands patented to settlers is an altogether different question from that involving a construction which would apply it to lands patented to the company, for the settler is given the option to elect whether he will retain the land or relinquish it, whereas no option is extended to the company in case the settler elects to retain the land.

It is the settled construction of the Interior Department that the act does not apply to lands patented before its passage, as appears from the circular of instructions submitted with the principal brief, and also from *Wasmund vs. Northern Pacific Railroad Co.*, 29 Land Decisions, 224.

In the next place, the record in this case does not show that Henry Nelson comes within the provisions of the act on any construction. The agreed statement of facts was made up and filed November 15, 1897 (Trans., p. 8), before the passage of the act. The act extends only to purchasers from the United States and to persons who "settled in good faith" prior to January 1, 1898. There is nothing to show

that Nelson settled "in good faith." Furthermore, the act provides that the company shall not be required to relinquish lands valuable for stone, iron, or coal or lands which it uses or needs for railroad purposes or lands which it has sold or contracted to sell. The issues having been settled, the agreed statement of facts filed, and the case tried before the act of July 1, 1898, was passed, there was and could be no inquiry as to whether the land came within any of these classes (Trans., p. 14).

Finally, the administration of the act of 1898 is in terms committed to the Secretaty of the Interior, and the determination of the questions of fact as to whether Henry Nelson was a settler in good faith so as to come within its provisions, and whether the land is valuable for stone, iron, or coal, or whether it is used or needed for railroad purposes, or whether it has been sold or contracted to be sold by the company and so excluded from the operation of the act, even if its construction be as claimed by the plaintiffs in error, are matters exclusively for the determination of the Secretary of the Interior.

Marquez vs. Frisbie, 101 U. S., 473.

If the plaintiff in error Henry Nelson has any rights under the act of the United States, he is entitled to proceed for their enforcement before the Secretary of the Interior. The act manifestly contemplates such procedure, and it is especially provided by paragraph 22 of the circular of instructions that an individual claimant may institute proceedings of his own motion.

It is submitted that the judgment should be affirmed.

C. W. Bunn and
James B. Kerr,
Counsel for Defendant in Error.

CIRCULAR

FROM THE

44

GENERAL LAND OFFICE,

CONTAINING

REGULATIONS, UNDER THE ACT OF JULY 1, 1898 (30 STAT., 597, 620), TO FACILITATE THE ADJUSTMENT BY THE LAND DEPARTMENT OF CONFLICTING CLAIMS TO LANDS WITHIN THE LIMITS OF THE GRANT TO THE NORTHERN PACIFIC RAILROAD COMPANY.

APPROVED FEBRUARY 14, 1899.

WASHINGTON:
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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 14, 1899.

The provision in the act of July 1, 1898, is as follows:

That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey: *Provided, however*, That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest Government subdivisions; and all right, title, and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as

if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor: *Provided further*, That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal: *And provided further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor: *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, and nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted: *And provided further*, That all qualified settlers, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their bona fide residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore pro-

vided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this act.

A.—WHO ARE THE BENEFICIARIES UNDER THIS ACT? FROM WHOM MAY RELINQUISHMENTS BE RECEIVED, AND BY WHOM MAY THE LIEU SELECTIONS BE MADE?

1. The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company, or its successor in interest, and in doing so different words and terms of description are used in different portions of the act; but, considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by settlement, entry, or purchase, initiated in good faith a claim to lands of the description given, "under color of title or claim of right under any law of the United States or any ruling of the Interior Department," and who is still maintaining such claim conformably to such law or ruling.

This class also embraces the heirs of the claimant in all instances where he has died, and his claim or entry or right to perfect title thereunder is one which under the public-land laws descends or passes to his heirs. It further embraces the assigns of the claimant in all instances where, in the absence of an inhibition against so doing, he has sold or transferred his claim or entry, or the right to perfect title thereunder, to one who is not by law disqualified from succeeding to such claim or entry, or the right to perfect title in himself thereunder.

2. The act designates as one beneficiary the Northern Pacific Railroad Company, or its lawful successor in interest, subject, however, to the following proviso:

* * * *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States; but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act. * * *

An examination of a certified copy of the record in the foreclosure proceedings referred to, and a consideration of the opinion of the Attorney-General dated February 6, 1897 (21 Opinions of Attorneys-General, 486), show that the Northern Pacific Railway Company is such lawful successor in interest as to all lands within the limits of the grant, excepting those situated in the State of Minnesota and in the State of North Dakota east of the Missouri River. As to all lands within the

limits of the grant situated in the State of Minnesota and in the State of North Dakota east of the Missouri River, the Northern Pacific Railroad Company has no successor in interest, but its property and affairs are now in the hands of receivers, appointed and acting under the authority and direction of certain circuit courts of the United States.

Within the limits of that portion of the grant to which the Northern Pacific Railway Company is thus the lawful successor in interest, relinquishments should be executed, and selections in lieu thereof should be made by said railway company. Within the limits of that portion of the grant situated in the State of Minnesota and in the State of North Dakota east of the Missouri River, relinquishments should be executed by the Northern Pacific Railroad Company, and also by the receivers thereof, and selections in lieu thereof should be made by such receivers on behalf of the railroad company; the receivers, in executing relinquishments and in making lieu selections, to act under proper authorization first obtained from the proper court.

3. In these regulations the claimant adverse to the railroad company or its successor in interest will, for convenience, be spoken of as the individual claimant his claim to the land in contest or controversy will be spoken of as an individual claim; the railroad company or its successor in interest, as the case may be, will be spoken of as the railroad claimant, and its claim to the land in contest or controversy will be spoken of as the railroad claim.

B.—WHAT LANDS ARE SUBJECT TO RELINQUISHMENT SO AS TO BECOME THE BASES FOR LIEU SELECTIONS?

4. To authorize a lieu selection the relinquishment must be of the whole or some legal subdivision of an odd-numbered section in either the primary or indemnity limits of the land grant to the Northern Pacific Railroad Company, which is the subject of conflicting claims asserted by an individual claimant upon the one part and by the railroad claimant upon the other part.

5. A relinquishment can in no event be made until after the land claimed has become identified by the public surveys.

6. The act makes *special provision* for instances where, *after January 1, 1898*, a qualified person in good faith makes settlement, with a view to homestead entry, upon unsurveyed lands within the primary limits of said grant, which upon survey are found to be within an odd-numbered section to which the right of the railroad company has attached by the definite location of its line of road. The purpose of this provision is to afford relief to those who make such settlement before the identification by survey of the lands to which the railroad claimant is entitled.

Such settlement claim must be continued and the right of the settler asserted after survey by an application at the local land office to make homestead entry of the lands settled upon, accompanied by proof of

such settlement, and the continued maintenance of the claim. These claimants are not accorded the privilege of taking other lands in lieu of those settled upon; but if the proof submitted is deemed satisfactory the railroad claimant will be requested to relinquish the lands embraced in said claims and to take other lands. All the provisions of these regulations are applicable to these lands excepting those pertaining to relinquishments by individual claimants.

7. Since the issuance of patent terminates the jurisdiction of the Land Department over the lands patented, and exhausts its power to examine and decide upon claims to such lands, and since this act manifestly refers to conflicting claims to lands which have not passed beyond the jurisdiction of the Land Department, it follows that its provisions are confined to unpatented lands, and that lands which have been patented are not the subject of relinquishment and can not be made the basis of a lieu selection under this act; but the point to which the opposing claims have been prosecuted, or the extent to which they have been considered by the Land Department, is not material if they be otherwise within the terms of the act, and the lands remain unpatented.

C.—WHAT ARE THE CLAIMS WHICH COME WITHIN THE PROVISIONS OF THIS ACT?

8. An individual claim adverse to the railroad claim is one which, prior to January 1, 1898, was initiated in good faith by some qualified person, by settlement, entry, or purchase, "under color of title or claim of right under any law of the United States or any ruling of the Interior Department," and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad claim, could be perfected into full title. (See also paragraph 6.)

9. The railroad claim is one which arises from the definite location of the line of railroad if the land is within the primary limits of the grant, or which arises from a lieu selection if the land is within the indemnity limits, and is one which, in the absence of all individual claims, would enable the railroad claimant to obtain full title to the land.

10. The purpose of the act is to avoid further strife and contention before the Land Department between the railroad claimant upon the one hand and individual claimants upon the other hand, and to that end the act extends alternately to the individual claimant and the railroad claimant an opportunity to acquire other lands of equal area in lieu of those in contest. The privilege of making a lieu selection is not dependent upon success or failure in the contest, but rather upon the existence of a contest or controversy which is intended to be disposed of without subjecting the parties to the delay, expense, and inconvenience incident to its further prosecution. The act contains a provision that nothing therein "shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted;" but in the light of other provisions in the act in harmony with which this one must be construed, it is

obvious that this provision is not intended to restrict the operation of the act to those instances in which the railroad claim is ultimately found to be the superior one.

To ascertain that fact would require the prosecution of every contest to a final decision, and would render the act practically inoperative, because, if compelled to litigate its claim to a final decision through the local office, the General Land Office, and before the Secretary of the Interior, it is doubtful whether the railroad claimant would surrender for the benefit of the defeated individual claimant the railroad claim thus established at a cost of much time, expense, and inconvenience. The claim which will support a relinquishment and lieu selection is not described as a *lawful* one, but as a "right * * * *claimed* to have attached by definite location or selection," and as a claim initiated in good faith "*under color of title or claim of right*," etc. Under the act of July 2, 1864 (13 Stat., 365), the railroad company became entitled to all the odd-numbered sections within the primary limits of the grant, or to indemnity for such as were "granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of," at the date of the definite location of its line of road.

Thus, the maximum quantity of lands to which the company was entitled is established by ascertaining the area included in odd-numbered sections within the primary limits of the grant as adjusted to the line of definite location. The clause in the act of July 1, 1898, providing against an enlargement of the quantity of lands to which the railroad company was then entitled has reference to the maximum quantity ascertained as aforesaid, and does not restrict the privilege of making selections under that act to those instances where the railroad claimant has an absolute legal right to the particular lands relinquished, a matter which would not be involved in an ascertainment of the quantity of the grant.

D.—WHAT LANDS ARE SUBJECT TO SELECTION IN LIEU OF THOSE RELINQUISHED?

11. Selections will be limited to a quantity of land not exceeding that relinquished, but, since all selections must be according to legal subdivisions which generally approximate but do not always embrace the same area, a slight difference in the acreage of the tract relinquished and selected will not be deemed an inequality in quantity.

12. Subject to the limitations named in paragraphs 13 and 14, selections may be made from any public lands within a State into which the Northern Pacific Railroad land grant extends, surveyed or unsurveyed, not mineral or reserved, not valuable for stone, iron, or coal, not subject to valid adverse claim, and not occupied by a settler at the time of such selection; but odd numbered sections within the Bozeman, Helena, and Missoula land districts in the State of Montana, and the Cœur d'Alene land district in the State of Idaho, which are also within the primary or indemnity limits of said land grant, can not be selected by

or patented to the railroad claimant unless they have been finally classified as non-mineral under the act of February 26, 1895 (28 Stat., 683).

13. Selections of unsurveyed lands by the railroad claimant are confined to odd-numbered sections or legal subdivisions therein "to be identified by the survey when made," that is, the selection must be of the whole or some legal subdivision of a designated odd-numbered section, so that the public survey when made will give identity to the land selected.

Selections of unsurveyed lands by an individual claimant must be designated according to the description by which they will be known when surveyed, if that be practicable, or if not practicable, by giving with as much precision as possible the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of survey come to be extended, and the selection must be made to conform to such survey within thirty days from the date of the receipt at the local land office of the approved plat of the township embracing such lands.

14. Lands selected by an individual claimant in lieu of other lands, the claim to which has *not* been carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate, must be in a compact body and be of the character subject to entry under the particular law controlling the claim relinquished, and this applies whether the lands selected are surveyed or unsurveyed. (See paragraph 36.)

E.—PROCEDURE IN OBTAINING RELINQUISHMENTS.

15. As soon as may be practicable after the adoption of these regulations, an examination will be made of the contests pending before the Secretary of the Interior, and those appearing to come within the provisions of the act of July 1, 1898, will be returned to the Commissioner of the General Land Office for disposition hereunder, together with all like contests then pending in the General Land Office. From time to time thereafter other contests or controversies appearing to come within the provisions of said act will be disposed of in like manner. Any claimant believing that his or its claim comes within the provisions of said act may request that such claim be disposed of thereunder, and such request will receive due consideration.

16. In speaking of the surrender by the individual claimant of the lands in contest and the taking by him of other lands in lieu thereof, the act describes it as a *transfer of his claim or entry;* but since the transaction, whether by the individual claimant or by the railroad claimant, is essentially the same, it is for convenience described and spoken of throughout these regulations as a relinquishment of the lands in contest and a selection of other lands in lieu thereof.

17. The option of relinquishing the lands in contest and selecting other lands in lieu thereof is by law first extended to the individual

claimant, and if he elects to hold the lands which are in contest the railroad claimant will be called upon to relinquish the same and to select other lands in lieu thereof. (See paragraphs 29 to 31, inclusive.)

18. Whenever any contest or controversy appears to come within the provisions of said act, the Commissioner of the General Land Office will notify the individual claimant of the option accorded by law to individual claimants and will request him, if still maintaining his claim as herein required, to make proof of such continued maintenance and to exercise his option within sixty days after the time of receiving such notice. (See paragraph 30.) If the claimant elects to relinquish the lands in contest and take other lands in lieu thereof, he must execute a proper relinquishment as hereinafter required (see paragraphs 24 to 26, inclusive), and transmit the same to the Commissioner of the General Land Office, together with notice of his election so to do.

19. In all cases where the individual claim has not passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, a failure to furnish satisfactory proof of the continued maintenance of the claim and to exercise such option within the time named will be deemed an abandonment of the claim, and the land embraced therein will be disposed of accordingly.

20. In all cases where the individual claim has passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, proof of the continued maintenance of the claim is not essential, but a failure to exercise such option within the time named will be deemed an election on the part of the individual claimant to hold the land in contest.

21. The Commissioner of the General Land Office may, in his discretion, extend the time for exercising such option in special cases upon proper cause being shown.

22. An individual claimant may, without formal notice or request, make proof of the continued maintenance of his claim and exercise his option and notify the Commissioner of the General Land Office thereof, in which event the notice and request otherwise required will not be necessary. (See paragraphs 18 and 24 to 26, inclusive.)

23. From time to time, and as soon as conveniently may be done, the Commissioner of the General Land Office shall prepare and submit to the Secretary of the Interior duplicate lists describing, according to the smallest legal subdivision, the lands to which there are conflicting claims as described in these regulations, and which the individual claimants have elected to hold; and, upon the approval of any such list by the Secretary of the Interior, the Commissioner of the General Land Office will retain one copy thereof in his office and will transmit the other copy thereof to the said railroad claimant, with the request that it relinquish its claims to the lands therein described. Every list will be deemed conclusive against the railroad claimant to the extent that it will be required, within sixty days after receipt thereof, to execute and deliver to the Secretary of the Interior a proper relinquishment to

the United States of all the lands in said list, or to make satisfactory showing that those not relinquished have been sold or contracted to be sold, or are used or needed for railroad purposes, or are valuable for stone, iron, or coal. (See paragraphs 24 to 26, inclusive, and 29 to 31, inclusive.)

F.—WHAT IS A PROPER RELINQUISHMENT?

24. The relinquishment must be an instrument in writing describing the lands in contest and making appropriate reference to the claim intended to be surrendered, and in terms releasing, quitclaiming, and relinquishing unto the United States of America all the right, title, interest, and claim of the individual or railroad claimant, as the case may be, to such lands. It must be executed, witnessed, and acknowledged conformably to the laws respecting the conveyance of real property in the State where the land is situate.

25. Relinquishments by individuals of claims which have passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, must also be executed by the wife of the claimant, if he have one, in such manner as will effectually bar any dower, homestead, or other interest on her part in or to the lands relinquished.

26. A relinquishment of an individual claim which has passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, or which under existing laws is assignable before that time, and also all relinquishments by the railroad claimant, must be accompanied by proof satisfactorily showing whether the land relinquished has been sold, contracted to be sold, or encumbered. (See paragraphs 1 and 32.)

G.—EFFECT OF RELINQUISHMENT—WHEN TO SELECT OTHER LANDS IS COMPLETE.

27. Upon the filing with and acceptance by the Commissioner of the General Land Office of a relinquishment by the individual claimant the lands in contest may be patented to the railroad claimant in the same manner as other lands falling within the terms of the grant; and the individual claimant, upon receiving notice of the acceptance of his relinquishment, will be entitled, upon proper application (see paragraph 32), to select other lands, according to the condition and limitations of said act (see paragraph 36).

28. Upon the filing with and acceptance by the Commissioner of the General Land Office of a relinquishment by the railroad claimant the lands so relinquished "shall revert to the United States, and such tracts shall be treated under the laws thereof in the same manner as if no rights thereto had ever vested in the said railroad grantee;" and the individual claimants thereto shall be permitted to perfect their claims or entries and to obtain title thereunder upon compliance with the laws pertaining thereto. In the event that any individual claim on account

of which a relinquishment is made by the railroad claimant is not perfected into full title the lands embraced therein will not revert to the railroad claimant, but will be subject to other disposition, according to law. The railroad claimant, upon receiving notice of the acceptance of its relinquishment, will be entitled, upon proper application (see paragraphs 32 to 41, inclusive), to select other lands, according to the conditions and limitations of said act.

H.—DISPOSITION OF CONTESTS INVOLVING LANDS SOLD OR CONTRACTED TO BE SOLD BY THE RAILROAD CLAIMANT, USED OR NEEDED FOR RAILROAD PURPOSES, OR VALUABLE FOR STONE, IRON, OR COAL.

29. By the terms of the act the railroad claimant is exempted and excused from relinquishing lands which have been sold or contracted to be sold by it, or which are used or needed for railroad purposes, or or which are valuable for stone, iron, or coal.

30. Where it satisfactorily appears from the record in any contest that the lands in controversy come within the terms of this exemption, the Commissioner of the General Land Office in calling upon the individual claimant to exercise the privilege accorded to him (see paragraphs 17 and 18) will notify him that the railroad claimant can not be required to relinquish such lands, and that unless he elects to relinquish the same and take other lands in lieu thereof the contest will proceed to final determination without further regard to said act; and where such exemption is satisfactorily shown after the individual claimant has elected to hold the lands in contest (see paragraph 23), the Commissioner of the General Land Office will notify him thereof and accord him another opportunity, to be exercised within a stated time, to relinquish the lands in contest and take other lands. In the event that this privilege is declined, the contest will proceed to final decision in the usual way.

31. The affidavit of two persons having personal knowledge of the facts will be deemed sufficient to *prima facie* establish that any lands come within this exempted class; but such affidavit should state fully when and to whom the lands were sold or contracted to be sold, and if contracted to be sold the extent to which such contract has been performed, and whether it is still subsisting, the necessity for the present or future use of such lands for railroad purposes, and the extent thereof, or how it has been ascertained that they are valuable for stone, iron, or coal, as the case may be.

I.—PROCEDURE IN SELECTING LIEU LANDS AND PERFECTING TITLES THERETO.

32. Applications to select lieu lands hereunder, whether by an individual claimant or by the railroad claimant, must be presented to the local land office of the district within which the lands selected are situate. The application must particularly state the description and

acreage of the lands relinquished, the acceptance by the Commissioner of the General Land Office of the relinquishment, and the description of the lands selected (see paragraph 13), and must be accompanied by proof that the land selected is of the character subject to selection (see paragraphs 11 to 14, inclusive). If the records of the local office do not show to the contrary, the character of the land will be deemed to be *prima facie* established where the application is supported by the oath of the individual claimant, or of an agent of the railroad claimant, based upon a personal examination of the land.

33. If the application is in proper form and, upon examination of the records in the local office, the lands selected appear to be subject to such selection, the local officers will accept the application, give it an appropriate number, make due notation of the selection upon the records of their office, and transmit the papers to the Commissioner of the General Land Office for his consideration.

34. When the lands selected have been returned as mineral by the surveyor-general, the first subdivision of paragraph 103 of the mining regulations, approved December 15, 1897, shall be applicable thereto; but in view of the proof exacted by paragraph 32 hereof the requirements of paragraph 104 of such mining regulations will be dispensed with as to all selections hereunder of lands not returned as mineral.

35. When any lands, whether surveyed or unsurveyed, have been selected hereunder by an individual claimant or by the railroad claimant, no right thereto can be initiated by settlement or entry while such selection remains of record.

36. Where lands are selected by an individual claimant in lieu of lands the claim to which has not been carried to final entry and certificate, or to the submission of final proof entitling him to final entry and certificate, the claimant will be required to perfect his right to the lands selected by compliance with the law relating to that class of claims, and to submit proof thereof in the usual way, but credit will be given for his *bona fide* residence, improvements, cultivation, or reclamation, as the case may be, and for any payment of fees or purchase money upon the land relinquished, it being the purpose of the act to give individual claimants the same status with respect to the lieu lands selected by them which they occupied with respect to the lands relinquished.

J.—TIME OF ISSUING PATENTS TO SELECTED LANDS.

37. Unsurveyed lands, whether selected by an individual claimant or by the railroad claimant, will in no event be patented until after survey.

38. Unsurveyed lands selected by the railroad claimant will not be patented until after the expiration of four months from the date of the receipt at the local land office of the approved plat of the township embracing the lands so selected; and surveyed lands selected by the

railroad claimant will not be patented until after the expiration of four months from the date of selection.

39. Unsurveyed lands selected by an individual claimant in lieu of lands the claim to which has been regularly carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate, will not be patented until after the expiration of four months from the date of the receipt at the local land office of the approved plat of the township embracing the lands so selected; and surveyed lands selected by an individual claimant in lieu of lands the claim to which has reached a like status will not be patented until after the expiration of four months from the date of selection.

40. The purpose of the last two paragraphs is, in all instances where publication and notice will not be had, to give to settlers, if any, upon such lands at the time of the selection thereof, the full period prescribed by law within which to apply at the local land office to make homestead entry of the land, and to afford ample time for the local officers to advise the Commissioner of the General Land Office of any such application before the time arrives for issuing patent under the selection.

41. Selections made by the railroad claimant which are found satisfactory by the Commissioner of the General Land Office will, upon the expiration of the time required to elapse before the issuing of patent (see paragraphs 37 to 40, inclusive), be certified to the Secretary of the Interior, and if approved by him will be patented to the railroad claimant as though originally granted.

K.—FORMS TO BE USED IN THE ADMINISTRATION OF SAID ACT.

42. The election of the individual claimant to hold or relinquish the lands in controversy and the proof of the maintenance of his claim may be made according to the following form:

THE STATE OF ———,
County of ———, *ss:*

———— ————, being first duly sworn, upon his oath deposes and testifies as follows:

1. Q. What is your name, age, and post-office address?—A. ———.

2. Q. Are you a native-born citizen of the United States; and if so, in what State or Territory were you born?—A. ———.

3. Q. If you are not a native-born citizen of the United States, have you declared your intention to become a citizen or have you been naturalized? If so, when and where?—A. ———.

4. Q. Are you the identical person who has heretofore been claiming (here describe land) under the —— law? If so, how and when was your claim initiated?—A. ———.

5. Q. Do you understand that there are conflicting claims to this land, one of which is your claim and the other of which is the claim of the Northern Pacific Railroad Company or its successor in interest?—A. ———.

6. Q. Do you desire and elect, under the act of Congress approved July 1, 1898 (30 Stat., 597, 620), to hold the land in controversy and

retain your present claim thereto, or do you desire and elect under said act to relinquish the land in controversy and to transfer your said claim to other lands?—A. ———.

7. Q. State fully and accurately where you resided from time to time since the initiation of your said claim to said land.—A. ———.

8. Q. Of whom does your family, if any, consist, and where have they resided from time to time since the initiation of said claim?—A. ———.

9. Q. State accurately what you have done in the way of improving, cultivating, or reclaiming this land, giving dates, value of improvements, and amount of expenditure.—A. ———.

10. Q. How much of the time were you upon said land during the year 1897, and what work did you do or have done thereon during that year?—A. ———.

11. Q. What personal property did you have on this land on January 1, 1898?—A. ———.

12. Q. Have you sold, conveyed, or mortgaged any portion of this land or assigned your claim thereto? If so, state when, to whom, and for what purpose.—A. ———.

13. Q. How much other land do you own now?—A. ———.

14. Q. Have you ever made a filing upon or an entry of other public lands? If so, give the time, description of the land, name of the land office, and character of the filing or entry.—A. ———.

15. Q. To whom can you refer for support and corroboration of the statements made herein?—A. ———.

(Sign plainly with full name.) ——— ———.

I hereby certify that the foregoing testimony was fully read to the said ——— ——— before being subscribed by him, and that the same was subscribed and sworn to by him before me this —— day of ———, ——.

——— ———.

NOTE.—This affidavit may be made before the register or receiver of the local land office, or before any other officer authorized to administer an oath.

If the claimant elects to relinquish the lands in controversy, he must execute the accompanying relinquishment.

43. A relinquishment by an individual claimant may be made substantially according to the following form, and one by the railroad claimant may be modeled therefrom:

Know all men by these presents:

That I, ——— ———, of ——— County, in the State of ———, the identical person who heretofore initiated and is now asserting a claim to the following-described lands, to wit, [describe fully and accurately] under the ——— law, desiring to take advantage of the provision in the act of Congress approved July 1, 1898 (30 Stat., 597, 620), authorizing an adjustment by the Land Department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, do hereby release, quitclaim, and relinquish unto the United States of America all my right, title, interest, and claim in and to the lands aforesaid, and I request that this relinquishment be accepted by the Commissioner of the General Land Office in order that, under the provisions of the act of Congress aforesaid, I may select other lands in lieu of those hereby relinquished, and may perfect and obtain title to the lands so selected instead of to the lands hereby relinquished.

I, ——— ———, wife of the said ——— ———, for the purposes aforesaid, do hereby join my said husband in releasing, quitclaiming,

and relinquishing unto the United States of America the lands aforesaid, and I do specially waive and relinquish any and all dower, homestead, or other interest in the lands relinquished to which I am now or might hereafter be entitled according to law.

Witness our hands and seals this —— day of ——, A. D. ——.

—— —— [SEAL.]

—— —— [SEAL.]

Witnessed by:

—— ——.

—— ——.

NOTE.—This relinquishment must be executed, witnessed, and acknowledged conformably to the laws respecting the conveyance of real property in the State where the lands relinquished are situate, and the officer before whom the acknowledgment is made must make and attach hereto, under his name and official seal, an appropriate certificate of such acknowledgment.

44. The application to select lands in lieu of those relinquished and the affidavit in support thereof may be substantially according to the following forms:

UNITED STATES LAND OFFICE AT ——,

(Date:) ——, ——.

No. ——.

I, —— ——, of the county of ——, in the State of ——, having made relinquishment of my (state character of claim) claim, covering the —— of section ——, in township ——, range ——, in —— land district, containing —— acres, heretofore included in the conflicting claims of the Northern Pacific Railroad Company, or its successor in interest, and myself, which relinquishment has been duly accepted by the Commissioner of the General Land Office, do hereby make application to select in lieu of the lands so relinquished the following lands, to wit: ——, in —— land district.

My post-office address is ——, ——.

—— ——.

UNITED STATES LAND OFFICE AT ——,

(Date:) ——, ——.

We hereby certify that we have carefully considered the foregoing application, and have critically examined the plats and records of this office, so far as they apply to the lands sought to be selected. Finding that the application and proofs fully conform to the statute and regulations thereunder, and that the lands selected appear by the records of this office to be subject to such selection, we have accepted the application and have made due notation thereof upon the records pending the advice of the Commissioner of the General Land Office. $ —— fees paid.

—— ——,

Register.

—— ——,

Receiver.

AFFIDAVIT TO BE MADE BY INDIVIDUAL CLAIMANT IN SUPPORT OF FOREGOING APPLICATION TO SELECT.

UNITED STATES LAND OFFICE AT ———,
(Date:) ———, ——.

No. ——.

I, ——— ———, of ——— County in the State of ———, being duly sworn upon my oath, do depose and say that my post-office address is ———, ———; that I am the individual claimant who makes the foregoing application under the act of July 1, 1898 (30 Stat., 597, 620); that I am acquainted with the lands sought to be selected under the foregoing application, and have examined every subdivision thereof; that there is not to my knowledge within the limits of said land any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or other mineral substance; that there is not within the limits of said land to my knowledge any placer or other valuable mineral deposit or any salines; that no portion of said land is claimed for mining purposes under local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year; that said land is essentially non-mineral land; that it does not to my knowledge contain any valuable stone, iron, or coal; that it is not reserved in any manner, is not subject to any valid claim whatsoever, and is not occupied by any settler. And further affiant sayeth not.

———, ———.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified to me); that I verily believe him to be a creditable person and the person he represents himself to be; and that this affidavit was subscribed and sworn to by him before me at my office at ———, within the ——— land district, on this —— day of ———.

———— ————,
———— ————.

NOTE.—This affidavit may be made before the register or receiver of the local land office or before any other officer authorized to administer an oath.

If the claim relinquished be a desert-land claim, timber-culture claim, or a timber-purchase claim, which has not been carried to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, the applicant must also make proof of the character of the land selected, as required by the regulations controlling that class of claims.

45. The following form may be used in listing lands to be relinquished by the railroad claimant:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., ———, *18*—.

Whereas, an act of Congress, approved July 1, 1898 (30 Stat., 597, 620), makes provision for the relinquishment by the Northern Pacific Railroad Company, or its successor in interest, upon the conditions therein named, of the whole or any part of an odd-numbered section, in either the primary or indemnity limits of the land grant to that company, to which the right of said company, or its lawful successor, is claimed to have attached by definite location, or selection, and which prior to January 1, 1898, has been "purchased directly from the United States or settled upon or claimed in good faith by any qualified settler, under color of title or claim of right under any law of the United

States, or any ruling of the Interior Department," or which, if an odd-numbered section in the primary limits, is settled upon after January 1, 1898, and before survey, by a qualified person, in good faith, with a view to homestead entry, and makes provision for the selection by said company, or its successor in interest, of other lands in lieu of those relinquished; and

Whereas, it is further provided in said act that the Secretary of the Interior shall ascertain and from time to time cause to be prepared and delivered to said railroad company, or its successor in interest, a list or lists of the tracts coming within the provisions thereof; and

Whereas, it is further provided by said act that said railroad company, or its successor in interest, shall accept the list or lists so made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but "shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal;" and

Whereas, it is further provided as to all claims, excepting homestead settlements made on unsurveyed lands after January 1, 1898, that "before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee, or its successor in interest, any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them, or hold his claim and allow the said railroad company to do so under the terms of this act;" and

Whereas, upon examination by this office the following tracts of land have been found to be of the character authorized to be relinquished under said act, and the claimants therefor against the railroad company (where entitled to such option) have, upon due notice of their rights under said act, refused to transfer their respective claims to other lands, to wit:

List No. —.

STATE OF——, —— LAND DISTRICT.

Parts of sections.	Sec.	Tp.	R.	Adverse claimants.

Now, therefore, the said list is hereby submitted to the Secretary of the Interior for his consideration, with the recommendation that directions be given to this office to call upon the Northern Pacific Railroad Company or its successor in interest, as the case may be, to relinquish all of said lands or to satisfactorily show that those not relinquished have been sold or contracted to be sold, or are used or needed for railroad purposes, or are valuable for stone, iron, or coal; and to advise said railroad company or its successor in interest that upon filing the relinquishment requested it will be entitled to select other lands in lieu thereof, as provided in said act.

_____ _____,
Commissioner.

DEPARTMENT OF THE INTERIOR,
_____ —, *18*—.

Approved:

_____ _____,
Secretary of the Interior.

L.—CASES NOT COVERED BY THESE REGULATIONS.

46. If in the administration of said act cases are found which are not covered by these regulations, such cases will be disposed of according to their respective merits under special instructions, or supplemental regulations embracing cases of that character will be adopted, as may seem necessary.

BINGER HERMAN, *Commissioner.*

Approved February 14, 1899.
C. N. BLISS,
Secretary.

Supreme Court of the United States.

No. 44.—October Term, 1902.

Peter Nelson and Henry Nelson, Plaintiffs in Error,
vs.
The Northern Pacific Railway Company.

In error to the Supreme Court of the State of Washington.

[January 26th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

The Northern Pacific Railway Company brought this action in one of the courts of the State of Washington to recover from the plaintiffs in error the southeast quarter of section twenty-seven, township twenty, north of range fourteen, east of the Willamette meridian, in Kittitas County, in that State—the company claiming to be the owner in fee and alleging that the defendants were in unlawful possession of the land.

The defendants denied each of the allegations of the petition, and the case was tried under a stipulation of facts, which for the purpose of the trial were conceded to be true. The facts so conceded were as follows:

The company is a corporation of Wisconsin, and succeeded, prior to the commencement of this action, to whatever right, title or claim the Northern Pacific Railroad Company had, if any, to the land in dispute. The latter corporation was created by an act of Congress approved July 2d 1864, c. 217, granting lands in aid of the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route, and by the acts and joint resolutions of Congress supplemental thereto and amendatory thereof. 13 *Stat.* 365. We will hereafter refer to those sections of the act, upon the construction of which the decision of this case mainly depends.

The railroad company duly accepted in writing the terms of the act of Congress, and on the 29th day of December A. D. 1864 such acceptance was served on the President of the United States.

The company fixed the *general* route of its road extending coterminous with said land, and within forty miles thereof, by filing a plat of such route with the Commissioner of the General Land Office August 20th 1873. Thereafter, on November 1st 1873, that officer transmitted to the register and receiver of the land office for the district in which the land was situate the following letter of instructions:

"Gentlemen: The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget Sound to a connection with their main line near Lake Pend d'Oreille in Idaho Territory, I have caused to be prepared a diagram which is herewith transmitted, showing the forty-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from *sale* or *entry* all the odd-numbered sections falling within these limits not already included in the withdrawal for the main-line period. The even sections are increased in price to $2.50 per acre, subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15th 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2d 1864, organizing said company."

The letter of the Commissioner and the diagram therein referred to were received and filed in the local land office November 17th 1873.

The land in dispute was within the forty-mile limit of the land grant as designated in the diagram.

On December 6th 1884 the railroad company *definitely located* the line of its railroad, coterminous with and within less than forty miles of the land in controversy, by filing a plat of such line, approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office; and prior to November 18th 1886 it constructed and completed a section of forty miles of railroad and telegraph line extending over the line of definite location and coterminous with the land here in controversy. The President of the United States having appointed three commissioners to examine the same, and the commissioners having performed that duty reported to the Secretary on the 18th day of November 1886 that the lines were completed in all respects as required by the act of Congress.

On the 30th of November 1886 the Secretary transmitted that report to the President with a recommendation that the railroad and telegraph line be accepted and on the 7th day of December 1886 the President approved that recommendation.

The United States executed and delivered, May 10th 1895, to the railroad company its letters patent, purporting to convey to the company the above tract under the terms and provisions of the act of 1864, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

In the year 1881, *three* years *before* the *definite location* of the road, the defendant Henry Nelson went upon the above land and *occupied* it, and has since *continuously resided* thereon. It is agreed that he was at the time qualified to enter public lands under the act of Congress approved May 20th 1862, entitled "An act to secure homesteads to actual settlers on the

public domain," and under the various acts supplemental thereto and amendatory thereof.

The land when occupied was unsurveyed, and was not surveyed until 1893. But *as soon as surveyed* Nelson attempted to enter it under the homestead laws of the United States in the proper United States district land office. His application was, however, rejected by the register and receiver because, in their opinion, it conflicted with the grant to the Northern Pacific Railroad Company.

The defendant Peter Nelson is in the occupancy of a portion of the land in question under license from his codefendant Henry Nelson.

Upon the facts so stipulated, the judgment was that the railroad company was not the owner, had no claim to and was not entitled to the possession of the land in dispute, and that the defendant Henry Nelson was entitled to remain in possession by virtue of the homestead laws of the United States. Upon appeal to the Supreme Court of Washington that judgment was reversed, and the cause remanded with directions to enter judgment for the company.

1. Before considering the merits of the case it is proper to remark that although the railroad company holds the patent of the United States for the land in controversy, the defendant, according to the laws of the State, was entitled to judgment, if it appeared that he was equitably entitled to possession as against the plaintiff. *Hill's Code*, 530 *et seq.*; *Burmeister* v. *Howard*, 1 *W. T. Rep.* 207.

2. We have seen that the Northern Pacific Railroad Company was created by the act of Congress of July 2d 1864, *c.* 217, making a grant of lands in aid of the construction of the road from Lake Superior to Puget Sound. When that grant was made substantially the entire country between those points was untraveled as well as uninhabited except by Indians, very few of whom, at that time, were friendly to the United States The principal object of the grant, as will appear from its language, was to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, by means of a railroad and telegraph, and to that end and in order to bring the public lands into market it was deemed important to encourage the settlement of the country along the proposed route. The public lands in that vast region were unsurveyed, and it was not known when they would be surveyed. Congress, of course, knew that if immigrants accepted the invitation of the Government to establish homes upon the unsurveyed public lands, they would do so in the belief that the lands would be surveyed, that their occupancy would be respected, and that they would be given an opportunity to perfect their titles in accordance with the homestead laws.

Such was the situation when the act of July 2d 1864 was passed. Necessarily the act must be interpreted in the light of that situation. It

should not be so interpreted as to justify the charge that the Government laid a trap for honest immigrants who risked the dangers of a wild, unexplored country, in order that they might establish homes for themselves and their families. And it should not be supposed that Congress had in view only the interests of the company, which, with the aid of a munificent grant of lands, was empowered to connect Lake Superior and Puget Sound with a railroad and telegraph line.

Let us now see what is the fair import of the act of 1864, under which both parties claim possession.

By the third section of that act it was, among other things, provided as follows, to wit: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, *and* whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, *and free* from pre-emption *or other claims or rights* at the time the line of said road is *definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, *prior to said time*, [of definite location,] any of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or pre-empted, or otherwise disposed of, *other lands* shall be selected by said company *in lieu thereof*, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. . ."

By the sixth section of the act it was, among other things, provided as follows:

"§ 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act." The stipulation of facts omits the latter part of section 6; but of the words omitted this court will take judicial notice. They are as follows: "But the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual

settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

The railroad company insists that after the order of withdrawal from "sale or entry" made in 1873 by the Commissioner of the Land Office, and based upon its map of general route, no right could be acquired by a settler upon any odd-numbered alternate section of land within the forty-mile limit indicated by the map of general route. As the lands in question were not surveyed until 1893, the company's contention means that during the twenty years succeeding the withdrawal in 1873 *all* the sections covered by the map of general route which would, upon a survey appear to be odd-numbered alternate sections, were absolutely excluded from occupancy by any settler having in view the homestead laws.

The defendant insists that the act of 1864 recognized the right of an immigrant to occupy any section of the public lands on the general route up to the time of the definite location of the road, provided it was done in good faith with the intention to perfect his title under the homestead laws whenever it became possible to do so, and that if at the time of *definite location* it appeared that he was in the occupancy of an odd-numbered alternate section the railroad company could not disturb him.

By the sixth section of the act of July 2d 1864 it was declared that the odd sections "hereby granted," that is, by that act granted, should not be liable to sale, entry or pre-emption before or after they were surveyed, except by the company, as provided in the act. But we have also seen, looking at the third section, which was the granting section of the act, that Congress did not *grant* every odd-numbered alternate section within the general limits specified, but *only* the odd-numbered alternate sections to which the United States had full title, and which had *not* been previously reserved, sold, granted or otherwise appropriated, *and* which were *free* from pre-emption or "other claims or rights" *at the time* the line of the road was *definitely fixed*—giving to the railroad company the right to select lands, within certain limits, in place of such as were found, *at the date of definite location*, to have been disposed of or to be "*occupied by homestead settlers.*"

The first inquiry is whether the railroad company acquired any *vested* interest in the land in dispute by reason merely of the acceptance by the Land Department of its map of *general* route or by reason merely of the withdrawal order of 1873. In other words, did the land, after the *general* route was established, become segregated from the public domain and cease to be a part of the public lands, so as not to be subject to occupancy, in

good faith, by homestead settlers, prior to definite location? These questions have a direct bearing on the present issues; for, if Congress did not intend—as, we think, it did not—that the railroad company should acquire any *vested* interest in these lands, prior to definite location, we can understand why it excluded from its grant any lands "occupied by homestead settlers" at the time of the *definite location* of the road.

The above questions are, we think, distinctly answered in the negative by recent decisions of this court. Let us see if such be not the case.

In *St. Paul & Pacific* v. *Northern Pacific*, 139 *U. S.* 1, 5, it was held that after a map of a *general* route was filed and *up to definite location*, the grant to the railroad company was in the nature of a "float," and land which previously to definite location had been reserved, sold, granted or otherwise appropriated, or upon which there was a pre-emption "or other claim or right" *did not pass by the grant* of Congress.

In *United States* v. *Northern Pacific Railroad Company*, 152 *U. S.* 284, 296, 298, the court said: "The act of 1864 granted to the Northern Pacific Railroad Company *only* public land, . . free from pre-emption *or* other claims or rights *at the time its line of road was definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office."

In *Northern Pacific Railroad Company* v. *Sanders*, 166 *U. S.* 620, 634, 636, it was adjudged that the railroad company "acquired, by fixing a *general* route, *only* an *inchoate* right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was *definitely located* and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper." In the same case the court, after observing that as the lands there in dispute were not free from claims at the date of definite location, it was of no consequence what was done with them after date, proceeded: "The only ground upon which a contrary view can be rested is the provision in the sixth section of the act of 1864, that 'the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act.' But this section is not to be construed without reference to other sections of the act. It must be taken in connection with section 3, which manifestly contemplated that rights of pre-emption *or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established.* Literally interpreted, the words above quoted from section 6 would tie the hands of the Government so that even it could not sell any of the odd-numbered sections of the lands after the general route was fixed—an interpretation wholly inadmissible in view of the provisions in the third section. The third and

sixth sections must be taken together, and so taken it must be adjudged that nothing in the sixth section prevented the Government from disposing of any of the lands prior to the fixing of the line of definite location, or, for the reasons stated, from receiving, under the existing statutes, applications to purchase such lands as mineral lands."

The principles announced in the Sanders case were reaffirmed in *Menotti* v. *Dillon*, 167 *U. S.* 703, 720, the court adding: "It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry and sale, lands within the general route of a railroad is to preserve the lands, unencumbered, until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines, '*not* sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed,' the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company."

In *United States* v. *Oregon &c. Railroad*, 176 *U. S.* 28, 43, which involved the conflicting claims of two railroad companies to certain lands and required the court to determine the effect of a map of general route filed by the Northern Pacific Railroad Company, as well as the extent of the grant made to it, the court said: "If, therefore, the Perham map of 1865 were conceded for the purposes of the present discussion to have been sufficient as a map of 'general route'—and nothing more can possibly be claimed for it—these lands could not be regarded as having been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line." In the same case: "In opposition to the views we have expressed, it may be said that the clause in the act of July 25th 1866, providing for the selection under the direction of the Secretary of the Interior of lands for the Oregon Company in lieu of any that should 'be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of,' shows that Congress did not intend to include in, but intended to exclude from the grant to that company any lands that could have been earned by the Northern Pacific Railroad Company by definitely fixing its route and filing its map of definite location. Undoubtedly those lands would be regarded as having been appropriated when the

route of the Oregon road was definitely located, if prior to that date the route of the Northern Pacific Railroad had been definitely fixed, and if such lands were within the exterior lines of that route. But, as we have said, these lands were within the limits of the grant of July 25th 1866 and had not, *at that time*, or when the route of the Oregon road was definitely located, been appropriated for the benefit of the Northern Pacific Railroad Company, for the reason that the latter company had not then filed any map of definite location. *The Northern Pacific Railroad Company could take no lands except such as were unappropriated at the time its line was definitely fixed.* It accepted the grant of 1864 subject to the possibility that Congress might, before its line was definitely fixed, authorize other railroad corporations to appropriate lands within its general route, allowing it to select other lands in lieu of any so appropriated. The lands here in dispute were consequently subject to be disposed of by Congress when the act of 1866 was passed; and (the line of the Northern Pacific Railroad not having been definitely located prior to the passage of the forfeiture act of 1890) the Oregon Company became entitled to take the lands and to receive patents therefor in virtue of its accepted map of definite location." See also *Wilcox* v. *Eastern Oregon Land Co.*, 176 *U. S.* 151, and *Messenger* v. *Same*, 176 *U. S.* 58.

The cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location as shown by an accepted map of its line; and that until definite location the land covered by the map of general route was a "float," that is, at large.

In support of the proposition that the railroad company acquired an interest in the lands in dispute, upon its general route being established, reference has been made to some expressions in the opinion of Mr. Justice Field in *Buttz* v. *Northern Pacific Railroad*, 119 *U. S.* 55, 71, and 72, to the effect that when the general route of that road was made known by a map duly filed and accepted, "the *law* withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted." But it is evident, in view of both prior and subsequent decisions, that this language is not to be taken literally or apart from the other portions of the opinions of the eminent jurist who delivered the judgment of the court. If, upon the filing and acceptance of the map of *general* route, the *law* withdrew the odd-numbered sections, then the previous holding in many cases that until definite location the grant was a float, with no interest in specific sections being acquired by the railroad company, would be meaningless; and there would be some difficulty in Congress appropriating such lands prior to definite location. Indeed, it is manifest that the court did not mean to announce any new

doctrine in the Buttz case; for Mr. Justice Field, when delivering judgment in that case, said that the charter of the Northern Pacific Railroad Company contemplated "the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the *definite location* of the line of its road, and *limits* the *grant* to *such* alternate odd sections as have not *at that time* been reserved, sold, granted or otherwise appropriated, and free from pre-emption, grant *or other claims or rights.* . . Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant operative *only* upon such odd sections as have *not* been reserved, sold, granted or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, *when the map of the definite location has been filed.*"

Further, we had occasion in *Northern Pacific Railroad* v. *Sanders* and *United States* v. *Oregon &c. Railroad Company*, above cited, to limit the broad language in the Buttz case which implied that after the general route was fixed the land was withdrawn by the *law* for the railroad company. We said in the last named case: "This language was too broad if it is construed to express the thought that public lands, when within the exterior lines of a 'general route,' are 'appropriated' from the time the map of such route is filed, so as to prevent them from being granted by Congress to and from being earned by another railroad corporation prior to the filing of a map of definite location by the company designating such general route."

It results that the railroad company did not aquire any *vested* interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such map; and if such land was not "free from pre-emption or other claims or rights," or was "occupied by homestead settlers" at the date of the definite location on December 8th 1884, it did not pass by the grant of 1864. Now, prior to that date, that is, in 1881, Nelson, who is conceded to have been qualified to enter public lands under the homestead act of May 20th 1862, went upon and occupied this land and has continuously *resided* thereon. The land was not surveyed until 1893, but as soon as it was surveyed he attempted to enter it under the homestead laws of the United States, but his application was rejected, solely because, in the judgment of the local land officers, it conflicted with the grant to the Northern Pacific Railroad Company. He was not a mere trespasser, but went upon the land in good faith, and, as his conduct plainly showed, with a view to residence thereon, not for the purposes of speculation, and with the intention of taking the benefit of the homestead law by perfecting his title under that law, whenever the land was surveyed And for fourteen years before the railroad company by an *ex parte* proceeding, and without notice to him, so far as the record shows, obtained

from the Land Office a recognition of its claim, and for sixteen years before this action was brought, he maintained an actual residence on this land. It is so stipulated in this case. As the railroad had not acquired any vested interest in the land where Nelson went upon it, his continuous occupancy of it, with a view, in good faith, to acquire it under the homestead laws as soon as it was surveyed, constituted, in our opinion, a *claim* upon the land within the meaning of the Northern Pacific act of 1864; and as that claim existed when the railroad company definitely located its line, the land was, by the express words of that act, excluded from the grant.

This view protects the *bona fide* settler in his home, established upon the invitation of the government under great difficulties, and does no injustice to the railroad company; for, after restricting the grant to such odd-numbered sections of lands, within specified lateral limits, as were free from pre-emption or "other claims or rights" at the time the line of the road was definitely fixed, Congress, in the act of 1864, as we have seen, proceeded: "And whenever, prior to said time [of definite location] *any* of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, pre-empted or otherwise disposed of, *other lands shall be selected by said company in lieu thereof*," &c. The words "occupied by homestead settlers" show that Congress intended by the charter of the Northern Pacific Railroad Company—whatever it may have intended as to other companies receiving grants of public lands—that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a *claim* which, existing at the date of definite location, would exclude from the grant land that might otherwise be covered by it. If Congress did not intend thus to protect the occupancy of homestead settlers, the reference to lands being "occupied by homestead settlers," at date of definite location, was meaningless, and it was useless to reserve to the company the privilege of selecting lands in lieu of those lost by such occupancy. Congress knew, when passing the act of 1864, that one going west to establish his home could not know whether the unsurveyed land occupied by him would be an even-numbered or odd-numbered section. Hence, the provision in section 3 in relation to odd-numbered sections "occupied by homestead settlers." The efficacy of such a provision could not be destroyed except by further legislation. It is as if Congress had in words declared that among the "other claims or rights" of which the land must be free at the time of definite location in order that the railroad company might take, were claims arising out of occupancy by homestead settlers. Such settlers Congress, in effect, declared should be protected in their rights, and the railroad company should be reimbursed by lieu lands near by. Nelson's occupancy, we have seen, commenced in 1881, while the definite location of the road occurred in

1884. That he occupied and continuously resided upon the land in dispute as a homestead settler after 1881 is admitted.

If it be said that Nelson's claim was that of mere occupancy, unattended by formal entry or application for the land, the answer is that that was a condition of things for which he was not in anywise responsible, and his rights, in law, were not lessened by reason of that fact. The land was not surveyed until twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until such survey. He acted with as much promptness as was possible under the circumstances.

In *Ard* v. *Brandon*, 156 *U. S.* 537, 543, this court said: "The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon the application." In the same case the court quoted with approval these words from *Clements* v. *Warner*, 24 *How.* 394, 397: "The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

In the recent case of *Tarpey* v. *Madsen*, 178 *U. S.* 215, 219—which was a contest between the Central Pacific Railroad Company and a pre-emptor who sought to avail himself of the act of September 1841—it was found as a fact that the land in dispute had on it, at the date of definite location, (which was on October 20th 1868,) the improvements of a *bona fide* settler; and one of the questions in the case was how far the rights of the settler, based upon a *bona fide* occupancy, were affected by the absence of a local land office in which could be made some record of his application or entry. This court said: "It is true that there was no local land office in which those seeking to make pre-emption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the Supreme Court of the State one of the main grounds for holding that the land did not pass to the railroad company. We agree with that court fully in its discussion of the general principles involved in the failure of the government to provide a local land office. The right of one who has *actually occupied, with intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent.* . . If Olney was in possession of this tract before October 20th 1868 [date of definite location] *with a view of entering it as a homestead or pre-emption claim*, and was simply deprived of his ability to make

his entry or declaratory statement by the lack of a land office, he could, undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights." In the present case, the settler waited from 1881 to 1893 for the land to be surveyed, and as soon as that was done he attempted to enter it under the homestead law in the proper office, but his claim was overruled upon the theory, unfounded in law, that the land was covered by the railroad grant.

So far we have proceeded on the ground that as the act of 1864 granted to the railroad company the alternate sections to which at the time of definite location the United States had full title, not reserved, sold, granted or appropriated, *and* which were *free* from pre-emption or other claims or rights at date of definite location, and authorized the company to select other lands in lieu of those then found to be "occupied by homestead settlers," Congress excluded from the grant any land so occupied with the intention to perfect the title under the homestead laws whenever the way to that end was opened by a survey.

3. But the case of the appellant does not depend entirely upon this view of the act of 1864. It is placed on impregnable ground by the act of May 14th 1880, c. 89, entitled "An act for the relief of settlers on public lands," and which was in force when, in 1881, Nelson settled upon the land in dispute. The act is as follows: "1. That when a pre-emption, homestead or timber-culture claimant shall file a written relinquishment of his claim in the local land office the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office. § 2. In all cases where any person has contested, paid the land office fees and procured the cancellation of any pre-emption, homestead or timber-culture entry he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported. § 3. That any settler who has settled, or who shall *hereafter settle*, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homstead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws." 21 *Stat.* 140.

The third section of this statute is a distinct confirmation of the rights of a qualified person who had theretofore settled or should *thereafter* settle "on *any* of the public lands of the United States, whether *surveyed or unsur-*

veyed, with the intention of claiming the same under the homestead laws;" though, of course, no lands could be deemed of that character which had prior to such settlement become vested in a railroad company in virtue of an accepted map of *definite location*. It is, as we have seen, a fixed principle in the law relating to the administration of the public lands that a railroad grant is a mere float until definite location, and that prior to that date all lands, within the exterior limits of a general route, are entirely at the disposal of the Government, to be appropriated as it desires. The railroad company, as already shown, acquired, by its accepted map of general route, no interest in any specific lands, but only a right to take those to which, at the date of definite location, the United States had full title, and upon which there was no claim, and which were not "occupied by homestead settlers." It was, therefore, competent for the United States by the act of 1880—which was four years prior to the definite location of the Northern Pacific Railroad—to give additional rights to those who had then settled, or might thereafter in good faith settle upon any of the public lands. Some who have made comments on this act seem to overlook the broad language of section three, and to forget that that section embraces not only those who had theretofore, but those who might *thereafter*, settle on the public lands, whether surveyed or *unsurveyed*. Nelson settled on unsurveyed public land, in which the railroad company had no vested or specific interest and the third section of the act of 1880 was purposeless if it did not allow him to perfect his title under the homestead laws, *as soon as the land was surveyed.*

The meaning we have given to the words "occupied by homestead settlers" in the act of 1864, and what has been said about the act of 1880, finds support in decisions of the Land Department. It will be well in view of the far-reaching consequences of the decision in the present case to refer to some of those decisions.

In *Southern Pacific Railroad* (*Branch*) v. *Lopez*, 3 *L. D.* 130, 131, (1884), Secretary Teller said that the act of July 27th 1866, 14 *Stat.* 292, relating to the Southern Pacific Railroad Company, "granted only such lands as were not reserved, sold, granted or otherwise appropriated, and free from pre-emption or *other claims or rights*, at date of definite location; and provided that 'whenever prior to said time any of said sections or parts of sections shall have been *occupied by homestead settlers*, pre-empted,' &c., lieu lands might be taken." It will be observed that this was the language of the Northern Pacific Act of 1864. The Secretary proceeded: "Now a homestead entry, which must be made on surveyed lands, would be within the descriptive terms 'other claims' without doubt; but the question material to the case before me, wherein the land was not surveyed, is whether a homestead settlement on unsurveyed land, with a view to entering it when surveyed, is within said terms. I think it is. Con-

struing together the granting words and those respecting the lieu land selection, it is evident that one of the 'other claims or rights' excepting land from the operation of the grant was 'occupation [occupied] by homestead settlers.' The word 'occupied' and the idea conveyed by it were foreign to the homestead law at date of this act, as an essential element in the reservation of land. I need not recite the numerous decisions of the courts and of the Land Department, which settle the principle that under the homestead law it is the 'entry' which reserves land (except for the short period during which it is reserved by settlement under the act of May 14th 1880) and not any occupation by the claimant before or after it. The language of the granting act is therefore peculiar in this respect, and we are to suppose that it was used deliberately, with knowledge of then-existing law, and for a special and important purpose. We must interpret it in accordance with this evident purpose. *Congress was aware that by this act it was making grants of land far beyond the line of the government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims.* By section 6 the homestead law was extended to the even sections after survey, and expressly withheld from the odd sections before and after survey, and yet in section 3 land '*occupied by homestead settlers*' was *excepted from the grant. Congress knew that unsurveyed land could not be 'entered' as homesteads; it had in terms prohibited homestead 'entry' on these lands; it was aware that only by such 'entry' could a claim be appropriated and reserved from the grant, without express exception; and therefore in the use of the words 'occupied by homestead settlers' it intended to make such express exception, and to indicate a different kind of appropriation by a class of settlers not within the letter of the homestead law, though clearly within its spirit, namely, those who had made a home on the public domain in advance of the surveys, with the intention of subsequently claiming it under said law.* If this was not the purpose, then the employment of the peculiar language referred to was a vain and useless thing; and such a thing we are not to suppose Congress had done (92 *U. S.* 733). It therefore follows that the land claimed by Lopez, whose proofs are not questioned in any particular, and who preferred his claim promptly upon survey, was 'occupied by a homestead settler' *when the grant to this company took effect, and hence excepted from the operation of the grant.*"

In *Northern Pacific Railroad Company* v. *Amys*, 10 *L. D.* 258–9 (1890), which was a contest between the Northern Pacific Railroad Company and a homesteader who had settled on unsurveyed public lands, Secretary Noble said: "It is urged that the land was not subject to the operation of the homestead law at the date of Newland's settlement, because unsurveyed, and that the homestead claim could have attached only by entry. But it must be remembered that the rights of the parties here must be determined

by a proper construction of the *railroad grant* rather than of the general *homestead law.* It must be admitted that the ruling in the case at bar is in line with those of the Department for many years. In the case of *Southern Pacific Railroad Company* v. *Lopez,* 3 *L. D.* 130, the question here presented was fully discussed in connection with a grant framed in words identical with those used in the grant for the Northern Pacific Company, and it was held that a homestead settlement on unsurveyed land with a view to entering it when surveyed is within the term 'other claims,' and that 'it is evident that one of the other claims or rights excepting land from the operation of the grant was occupation by homestead settlers.'" In support thereof it was urged that Congress was aware that by the act in aid of a road extending across the western half of the continent, it was making a grant far beyond the line of government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims. In this view I concur. It seems beyond question that it was to protect such settlers as described above that Congress excepted from the operation of the grant tracts 'occupied by homestead settlers.' Had Congress intended to extend its protection only to those who had made entry, it would have said so in other and appropriate words. The ordinary exception of 'lands to which a homestead right has attached' would have fully protected that class of settlers. But Congress went further and made occupation the test, instead of entry. I do not deem it necessary to cite cases to show that the views of the Department on this point have not changed."

In *Spicer* v. *Northern Pacific R. R. Co.,* 10 *L. D.* 440, 443, the rights of an Indian were disputed by the Northern Pacific Railroad Company under the act of March 3d 1875, 18 *Stat.* 402, 420, *c.* 131, extending the benefit of the homestead laws of the United States, with certain restrictions upon the title when obtained, to Indians twenty-one years of age, or the head of a family having abandoned the tribal relations. Secretary Noble said: "The provisions of this act were in force at the date when the company's rights attached on definite location of its road, and, if the matters alleged relative to the claim of the Indian, Enoch, be true, he was *at that date, and had been for many years prior thereto, living upon the land in question, as his home, with the intention to acquire title thereto as a homestead; he had valuable and permanent improvements thereon, and had cultivated the same for many years, during all of which time he claimed it as his home.* Such a claim, it seems to me, is clearly covered by the excepting clause of the grant to the company, and, if proven, would be sufficient, in my judgment, to defeat the claim of the company to the land. True, the Indian had put no claim of record for the land, but it is well settled by departmental rulings that while such omission might defeat the claim as against a subsequent settler who duly places his claim of record, it will not

defeat such claim as against the United States, and the land covered thereby *will be excepted from the operation of any grant for the benefit of a railroad company attaching subsequently to the inception of the settlement right. Northern Pacific Railroad Company* v. *Evans*, 7 *L. D.* 131, *and authorities there cited.* It is also well settled that a claim *resting on settlement, residence and improvements*, acquired prior right to the date when the company's rights attached under its grant, is sufficient to except the land covered thereby from the operation of such grant."

In *Northern Pacific Railroad Company* v. *McCrimmon*, 12 *L. D.* 554, it was said: "In support of this appeal, counsel for the railroad company contend that Thomas did not claim the land as government land, but as railroad land, and that, although the land was excepted from the withdrawal on general route, yet Thomas did not insist upon the right to take it as government land, but was satisfied to claim it under the railroad company. Under the ruling of the Department, as announced in the cases of *Northern Pacific Railroad Company* v. *Bowman*, 7 *L. D.* 238, and *Northern Pacific Railroad Company* v. *Potter*, 11 *L. D.* 531, the only question to be determined, is, *whether there was a settlement on the land at date of definite location* by *one having the qualification to enter the land under the settlement laws*, and, if these facts are shown, *the land would be excepted from the operation of the grant*, although such settler might not have known of his right, but held the land under the belief that it was railroad land."

In *Northern Pacific Railroad Company* v. *Plumb*, 16 *L. D.* 80, it appeared that the land in dispute was within the primary limits of the company's grant as shown by map of definite location filed July 6th 1882, and was also within the limits of the withdrawal on map of general route filed February 21st 1872. Secretary Noble said: "The only question raised by the appeal is as to whether the occupancy shown by Plum was sufficient to defeat the grant. It appears that in 1881 Plumb took possession of the tract in question, together with an adjoining forty-acre tract, upon which he resided. In the spring of 1882 he broke the entire tract in question and enclosed it with a fence, and has since had possession of and improved the land. He had never exercised the pre-emption right, and was therefore duly qualified to claim the land under his settlement right. In 1886 he contracted to purchase the adjoining forty acres, upon which he had resided, from the company, and at the hearing it was sought to show that he also claimed the land in question under the grant at the date of the definite location of the road, but the testimony will not warrant such a finding. *Being in possession of the land in question at the date of the definite location of the road with valuable improvements thereon, and duly qualified to assert a right thereto under the settlement laws, he had such a right to the land as served to defeat the grant*, and the fact that

the claim subsequently asserted by him was under a different law from those providing for settlement can in nowise affect his rights in the premises. Being excepted from the grant by reason of his settlement, Plumb was at liberty to seek title from the government under any law under which such lands might be taken."

In *Northern Pacific Railroad Company* v. *Benz*, 19 *L. D.* 229, the land in dispute was within the limits of the grant to the company, as shown by map of definite location filed July 6th 1882, and was covered by the withdrawal upon general route of February 21st 1872. Secretary Smith said: "The present contest is between the railroad company on one part and Hoy and Benz on the other. If it can be made to appear affirmatively by good and sufficient testimony that either of these parties, Hoy or Benz, was *in possession of* said land July 6th 1882 *when the line of the road opposite thereto was definitely fixed, and, at the same time, had the right to perfect title to the same under the pre-emption or homestead laws, such possession excepted the land from the grant to the railroad company* and reduced the contest to one between Hoy and Benz; or, rather, to one between Hoy and the legal representatives of Benz, he having died since entering his appeal." It was found that on July 6th 1882 Hoyt was a competent entryman under the homestead laws.

What has been said as to the meaning and scope of the acts of 1864 and 1880 is not inconsistent with anything decided in *Maddox* v. *Burnham*, 156 *U. S.* 544, and *Wood* v. *Beach*, 156 *U. S.* 548.

In *Maddox* v. *Burnham* the question was as to the rights of a homestead occupant as against a certain railway company. Referring to the third section of the act of 1880, the court said: "By this section for the first time the right of a party entering land under the homestead law was made to relate back to the time of his settlement. But this act was passed *long after the rights of the railway company had accrued and the legal title had passed to it.* It is not operative, therefore to divest such legal title, or enlarge *as against such title* any equitable rights which the defendant theretofore had." This was a case therefore in which the claim based upon occupancy accrued after the legal title had become vested in the railroad company, not a case in which the grant was, as here, a float with no right attached to any specific section.

In *Wood* v. *Beach*—which was a contest between a homestead settler and a railway company—it appeared that the map of the line of definite location was filed December 6th 1866, and a withdrawal followed in 1867, while the occupation and settlement of the homesteader did not commence until June 8th 1870. Of course, the legal title to the sections granted vested in the railway company upon the filing and acceptance of the map of definite location. Besides the withdrawal in 1867 was pursuant to the express command of the act of Congress of July 26th 1866, 14 *Stat.* 290, § 4, which provided

that as soon as the railway company should "file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by that act in such manner as may be best calculated to effect the purpose of this act and subserve the public interest." It might well be, therefore, that one whose right, resting upon occupancy, had accrued, as in *Maddox* v. *Burnham*, after the legal title passed to the railroad company, or one who, as in *Beach* v. *Wood*, did not settle upon the public lands until after the railroad company had definitely located its road, and after the lands had been withdrawn from market pursuant to the directions of an express act of Congress, could not, as against the railroad company, acquire an interest in them in virtue of the act of 1880.

Nor is there any conflict between the decision now rendered and *Northern Pacific Railroad* v. *Colburn*, 164 *U. S.* 383; for, as appears from the opinion and record in that case, the land there claimed to have been occupied by a homestead settler, at the date of definite location, was *surveyed* public land, and the good faith of the occupation was not manifested by an entry, or an attempt at entry, at any time in the local land office. It was held that the inchoate right of the homesteader must be initiated by a filing in the land office. In the present case, as we have seen, the land occupied was unsurveyed, and at the time of such occupancy, the land being unsurveyed, there could not then have been any filing or entry in the land office.

The case before us is altogether different. Nelson's occupancy occurred after the passage of the act of 1880. While that act did not apply to a railroad company which had acquired the legal title, by a definite location of its road, it distinctly recognized the right prior to such time to settle upon the public lands, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws. In occupying the land here in dispute Nelson did not infringe upon any *vested* right of the railroad company; for there had not been at the date of such occupancy in 1881 any definite location of the line of the railroad, and the land, so occupied, with other lands embraced by the map of *general* route, constituted only a "float," the company having, at most, only an inchoate interest in them, a right to acquire them, *if, at the time of definite location*, it was not "occupied by homestead settlers" nor incumbered with "other claims or rights." The withdrawal merely from "sale or entry" in 1873, based only on a map of the general route of the road, did not identify any specific sections, was not expressly directed or required by the act of 1864, was made only out of abundant caution and in accordance with a practice in the Land Department, and did not and could not affect any rights given to homestead occupants by Congress in the acts of 1864 and 1880. Besides, the order made in 1873 to withhold from *sale* or *entry* all the

odd-numbered sections falling within the limits of the general route was without practical value so far as the land in dispute was concerned; for such land had not been surveyed, and there could not have been any sale or entry of unsurveyed lands. At any rate, the order of withdrawal directing the local land office to withhold from "sale or entry" the odd-numbered sections within the limits of the *general* route could not prevent the *occupancy* of one of those sections prior to definite location by one who in good faith intended to claim the benefit of the homestead law; this, because such right of occupancy was distinctly recognized by the act of 1864. But if this were not so, the act of 1880, in its application to public lands, which had not become already vested in some company or person, must be held to have *so modified the order of withdrawal based merely on general route, that such order would not affect any occupancy or settlement made in good faith, as in the case of Nelson, after the passage of that act, and prior to definite location.* This conclusion cannot be doubted, because the act of 1880 made no exception of public lands covered by orders of withdrawal from sale or entry based merely on general route, and because also public lands, which had not become vested in the railroad company, by the definite location of its line, were subject to the power of Congress.

It results that the Supreme Court of the State of Washington erred in not affirming the judgment of the court of original jurisdiction in favor of the defendants.

The judgment must be reversed, and the cause remanded for such further proceedings as may not be inconsistent with this opinion.

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 44.—October Term, 1902.

Peter Nelson and Henry Nelson, Plaintiffs in Error,
vs.
The Northern Pacific Railway Company.

In error to the Supreme Court of the State of Washington.

[January 26, 1903.]

Mr. Justice Brewer, with whom Mr. Justice Brown and Mr. Justice Shiras concur, dissenting.

I dissent from the judgment in this case. It overrules a unanimous judgment of this court, one which for nearly twenty years has been a guide to the Land Department in the construction of the Northern Pacific Railroad grant. Further, in effect it declares that an entire section in the act of Congress making the grant, a section which from the inception of the work of construction has always been regarded by the parties interested as a provision intended to secure to the company the full measure of lands granted, is meaningless, and gave the company absolutely no protection whatever.

It is admitted that the company fixed the general route of its road coterminous with the road in controversy and within forty miles thereof, by filing a plat of such route with the Commissioner of the General Land Office on August 20, 1873, and that on November 1, 1873, the odd-numbered sections within the forty-mile limits of this route were by the Land Department withdrawn from sale or entry and the even-numbered sections increased in price to $2.50, notice of which order was immediately filed in the local land office. In 1881, eight years thereafter, the plaintiff in error for the first time entered upon the lands and commenced its occupation. It is also admitted that by construction of its road the company has perfected its title to its land grant. Now, when the company filed its map of general route and obtained from the Land Department the order of withdrawal, it believed that it acquired something. It did not suppose that it was doing a vain and useless thing. It did not believe that Congress had cheated it with a delusive expectation of a benefit which it did not intend to give.

Was it justified in such belief? To answer this it is well to look back to the condition of things at the time the granting act was passed. In 1862, Congress created the Union Pacific Railroad Company to build a

railroad from the Mississippi River to the Pacific Ocean along the only then frequented line of travel. It made to the company a land grant, one-fourth the size of the Northern Pacific grant, and agreed to lend it $16,000 and upwards per mile to aid in the construction, taking a first mortgage on the road as security for the loan. Notwithstanding this grant of land, this loan of money, and the fact that the road was to be along the only frequented line of travel, capital could not be induced to invest in the enterprise. Two years thereafter, and in 1864, Congress passed an amendatory act which doubled the land grant, making it half as large as that of the Northern Pacific, and agreed to take as security for its loan a second mortgage, giving to the company the right to place a first mortgage on the road in an amount equal to the government loan. And only after this large financial assistance and increased land grant was the work of construction commenced. On the same day Congress passed the act incorporating the Northern Pacific Railroad Company and making to it its grant. It promised no assistance in money, but only in lands. In order to give the company assurance that it would obtain its full grant it placed in the act section 6, the section which this court now holds is absolutely ineffectual therefor. That section reads:

"*And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

At the time of the passage of the act the entire body of the country from the western boundary of Minnesota to the Cascade Range was unoccupied, untraveled, and almost wholly unexplored. As said by Senator Hendricks, when the bill was before the Senate: "Everybody can see at a glance that it is a work of national importance. It proposes to grant lands in a northern latitude where, without the construction of a work like that, the lands are comparatively without value to the government. No person acquainted with the condition of that section of country supposes that there can be very extensive settlements until the government shall encourage those settlements by the construction of some work like this." And by Senator Harlan, the chairman of the Committe on Public Lands:

"The Committee on Public Lands agree to report this bill favorably on account of the vast consequence that will attach to the completion of the road. The land is to be conveyed to the company only as the road progresses. The committee were of opinion that if the road should be built the government could well afford to give one-half the land, for the distance of forty miles on each side of the road, to secure its completion. If it should not be built, no lands will have been conveyed." In other words, the proposition was to give half of the lands within forty miles of the road to the company—not to give as much land as would be equal to half the lands within forty miles of the road, but to give half of those lands. The difference is obvious. The construction of a railroad increases the value of contiguous lands. Congress doubles the price of the even-numbered sections which it retains. It makes no little difference to a company whether it receives lands along the line of the road which it constructs, lands which have been increased in value by reason thereof, or an equal amount of lands hundreds of miles away and not so increased in value.

The withdrawal was not left to the discretion of the company, but was to be made by the President, after the general route had been fixed, and "as fast as may be required by the construction of said railroad." True, the language is that he "shall cause the lands to be surveyed;" but this, coupled with the prohibition against sale or entry, was tantamount to a direction to withdraw, and has always been so regarded by the Land Department and all parties interested. Thus he was to determine whether the time had arrived for a withdrawal. The withdrawal was in fact made. The President exercised his judgment and decided that the time had arrived for a withdrawal, and the Land Department through all its officials proceeded to act accordingly. The direction in the withdrawal was "to withhold from sale or entry all the odd-numbered sections falling within these limits." Surely this action of the President and the Land Department is entitled to the highest consideration. As said by Chief Justice Marshall, in *Cohens* v. *Virginia*, (6 Wheat. 264, 418): "Great weight has always been attached, and very rightly attached, to cotemporaneous exposition." See the many authorities on this proposition collected in *Fairbank* v. *United States*, (181 U. S. 283, 307.)

But notwithstanding this section, notwithstanding the action of the executive officers in directing a withdrawal of this land from sale or entry, it is now held by the court that it was subject to homestead entry, and that the entryman acquired a right to obtain title by an entry made eight years after the withdrawal. Of course, as I said, such a ruling nullifies the section. A withdrawal from sale or entry which leaves unaffected the right of purchase or entry is an irreconcilable contradiction. But can there be any reasonable doubt as to the meaning of section 6 or that Congress intended exactly what was done by the executive officers, to wit, the with-

drawal of all the odd sections within the forty-mile limit from sale, entry or pre-emption? The significant words are these: "The odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company." Now it is said in the opinion of the majority that section 3 defines what is "hereby granted" as "every alternate section" to which "the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed," that those lands, and those only, are the ones not liable to sale, entry or pre-emption, except by the company. It will help to write out the sentence with a substitution for the words "hereby granted" of the definition thereof which is presented, and it will read substantially as follows: The odd sections of land within the withdrawal limits to which the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road is definitely fixed shall not from the time of the withdrawal until the filing of the map of definite location be liable to sale, entry or pre-emption before or after they are surveyed, except by the company. Or, to put it in another form, the odd sections within the withdrawal limits, which no one purchases or enters before the filing of the map of definite location, shall not be purchased or entered by anybody except the company. It would be a failure of due respect to Congress to use language adequately expressive of the absurdity of such legislation. But Congress never meant any such thing. While it may be that the use of the words "hereby granted" was unfortunate, yet what was intended is clear. Congress intended to grant the odd-numbered sections and retain the even-numbered, and while in the granting clause some qualifications were placed in respect to the odd-numbered sections, in order to protect individual rights then existing, or which Congress might thereafter specifically create, yet as Congress was here not attempting a precise definition of what should pass by the grant, it used the term "granted lands" as descriptive generally of the odd-numbered sections, to distinguish them from the land retained, the even-numbered sections. It obviously intended that no rights should be acquired, either by sale, entry or pre-emption, to any of the odd-numbered sections after the filing of the map of general route, and this whether the lands were surveyed or unsurveyed. This is made clear by the last sentence in the paragraph. It says, "and the reserved alternate sections shall not be sold by the government at a price less than $2.50 per acre." Clearly that meant all the even-numbered sections, and not simply those which happened to be alternate to odd numbered sections passing to the company. The truth is that in section 3 Congress defines specifically and carefully the lands which it granted. Its attention was directed in that clause to the matter of definition. While in section 6 it was not attempting to define,

but to provide for a withdrawal before the filing of the map of definite location, and was simply endeavoring to make effective rights which it intended should accompany such withdrawal.

Again, in *Hewitt* v. *Schultz*, (180 U. S. 139,) it was held that the withdrawal directed by Congress in section 6, coupled with the provision extending homestead and pre-emption rights to all other lands on the line of the road, created an implied prohibition of any withdrawal of lands within the indemnity limits provided in section 3. It is unquestioned that, whenever a grant had been made of lands, the power of the Land Department to withdraw such body of lands, as might seem reasonably necessary for the satisfaction of the grant, had been frequently upheld by this court. See the long list of cases cited in the dissenting opinion on page 159. There is no express prohibition of like action by the Land Department in respect to lands within the Northern Pacific indemnity limits, and the judgment was based solely on the implied prohibition above referred to. The opinion of the court rested mainly on the rulings of the Land Department, as primarily expressed in the opinion of Secretary Vilas in *Northern Pacific Railroad Company* v. *Miller*, (7 Land Dec. 100,) from whose opinion large quotations were made, and in respect to rulings of the Land Department generally, it was said, conceding that the question involved was one of doubt (p. 157):

"It is the settled doctrine of this court, as was said in *United States* v. *Alabama Great Southern Railroad*, (142 U. S. 615, 621,) 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.'"

Turning to the opinion of Mr. Secretary Vilas, we find him saying (pp. 110, 111, 113, 119):

"But a peculiarity in legislation of this character is found in the sixth section of the act, in which a provision authorized the 'general route' to be fixed, and required lands to be surveyed for forty miles in width on both sides of the entire line so fixed, and directed that the odd-numbered sections granted by the act should not be liable to sale or entry or pre-emption before or after they were surveyed, except by said company. In the language of the Supreme Court, in *Buttz* v. *Northern Pacific R. R.* (119 U. S. 71): 'The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted or otherwise appropriated, and are free from pre-emption, grant or other claims or right; but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or pre-emption of the adjoining odd sections within forty miles on each side until the definite location is made.'

"The facts which have been recited show beyond all reasonable question that the privilege given to the company of fixing, first, a line of general route, upon the basis of which the odd-numbered sections within forty-mile limits on either side were to be withdrawn from sale or entry or pre-emption before and after survey, was fully exercised by the company in Washington Territory, from the eastern boundary to the mouth of the Walla Walla River, and thence along the Columbia to the first range line west of the Willamette principal meridian, and thence north to the international boundary, by its filing and the department's approval of its maps of location on the 30th of July, 1870. These maps and the action taken thereon fully met every requirement of the statute in that behalf. The company, by resolution, fixed this line as the basis of withdrawal, made its formal request that the land should be withdrawn thereon, the line was plainly and sufficiently described, the department accepted it, and applied the statutory consequence by directing the local land officers in Washington Territory to withdraw the odd-numbered sections along that line as far north as the town of Steilacoom, first, for a width of twenty miles on either side, and, later in the same year, within the limit of an additional twenty miles; and also by increasing the minimum price of the even-numbered sections within the same limits to two dollars and fifty cents per acre. Thus the action of the company and of the department co-operated to give official determination to the fact upon which the statute became applicable, both to withdraw the odd-numbered sections and to double the minimum price of the even-numbered sections, and both effects were formally recognized and declared. It cannot be doubted that, had no other action been taken before the line of the road for construction was definitely located, this action in regard to the line of the general route of 1870 must have remained continuously operative upon all lands within the limit of forty miles on either side of the line so established. So obvious is this, indeed, that from the mouth of the Walla Walla River, westwardly along the Columbia, that withdrawal remains to this day obligatory and operative by force of the statute and of that location. . . . By virtue of that withdrawal the odd-numbered sections within forty miles of all that portion of the route lying east of the Columbia remained for nearly two years at least segregated from the public domain, and all purchasers of the even-numbered sections were required to pay the double minimum price for the land they bought. . . . Having provided the condition upon which a withdrawal of the public domain should be operative upon a preliminary general route for the benefit of this company, without any latitude of authority for any other, the legislative will must be regarded as exclusive of any other. . . . Thus, *the meaning of the act appears to be that the provisional line of general route should, in the first place, be taken as the line upon which the grant was made, and, during the period while no other line was fixed than such line of general route, the lands in the odd-numbered sections within forty miles should be taken as the granted lands, and, therefore, they are declared by the statute to be the 'hereby granted' lands.*" (The italics are mine.)

Thus the court held that, because by section 6 the odd-numbered sections were withdrawn from sale or entry, and at the same time it was declared that the homestead and pre-emption laws should apply to all other lands, there was an implied prohibition upon the Land Department's with-

drawal of odd-numbered sections within the indemnity limits. Now it is held that the withdrawal directed by section 6 and made by the Secretary of the Interior was absolutely meaningless and secured nothing to the company. If the withdrawal directed by section 6 intended nothing, accomplished nothing, it should not have been made the basis for an implied prohibition of the hitherto unquestioned power of the Land Department to withdraw lands in indemnity limits. There is an incongruity in the two decisions which, to my mind, is, to use no stronger expression, both sad and startling.

Further, the Land Department did in fact withdraw from sale or entry all the odd-numbered sections within the forty-mile limits of the general route—and this withdrawal included the tract in controversy as well as the other odd-numbered sections—and notice thereof was filed in the local land office, and this many years before the plaintiff in error went upon the land. As heretofore stated, the power of the Land Department to withdraw from private entry lands which it has reason to believe may be necessary to satisfy a land grant has never been denied. It is a power which has been exercised again and again from the inception of land grants. In one case, (*Wolcott* v. *Des Moines Company*, 5 Wall. 681,) we sustained a withdrawal made by the department beyond the real terminus of the grant on the ground that there was some doubt where the grant terminated, and therefore the department was justified in making the withdrawal cover any possible conclusion as to such terminus. There was in the Northern Pacific act no prohibition on the Land Department's exercise of this customary power. Indeed, as I have shown, it was held in *Hewitt* v. *Schultz*, *supra*, that the express direction to withdraw lands in the place limits was the foundation of an implied prohibition on a withdrawal of lands within the indemnity limits. The purpose and effect of a withdrawal are not to vest any title in the beneficiary of the grant, but to preserve the lands from private entry in order that when the time arrives the grantee may receive the full measure of its grant. As said in *Menotti* v. *Dillon*, (167 U. S. 703, 720, 721):

> "It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry and sale, lands within the general route of a railroad is to preserve the lands, unencumbered, until the completion and acceptance of the road. . . . That order took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road."

This language was quoted with approval in *United States* v. *Oregon &c. Railroad Company*, (176 U. S. 28, 48.)

Again, in *Northern Pacific Railroad* v. *Musser-Sauntry Company*, (168 U. S. 604, 607,) we said:

"The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation."

And the same doctrine has been affirmed in many cases.

Turning to the rulings of the Land Department, in *Hestetun* v. *St. Paul &c. Railway Company*, (12 L. Dec. 27, 28,) it was said by Secretary Noble:

"The legal effect of the withdrawal is to preclude the disposal of the land covered thereby under any of the land laws. In other words, so long as the withdrawal remains in force, the land covered thereby is simply held for the purpose for which the withdrawal was made."

And again, in the same volume, in *In re Chicago &c. Railway Company*, (pp. 259, 261):

"In the case of *Riley* v. *Wells*, referred to and quoted in the Shire case, it was said by the Supreme Court that settlement upon and possession of land within the limits of an executive withdrawal were 'without right,' and that the subsequent recognition by the land officers of such settlement and possession, and the permission to the party to make proof and entry under the pre-emption law, and the issuing patent 'were acts in violation of law and void.' This case of *Riley* v. *Wells* has never been overruled or modified, but has been referred to and approved in a number of the decisions of the Supreme Court, and must therefore be accepted as expressing the opinion of that tribunal as to the absolute invalidity of settlements upon lands withdrawn by executive order."

In *In re Hans Oleson*, (28 L. Dec. 25, 31,) Secretary Bliss thus defined the word "withdrawal:"

"In the nomenclature of the public land laws the word 'withdrawal' is generally used to denote an order issued by the President, Secretary of the Interior, Commissioner of the General Land Office, or other proper officer, whereby public lands are withheld from sale and entry under the general land laws, in order that presently or ultimately they may be applied to some designated public use, or disposed of in some special way. Sometimes these orders are not made until there is an immediate necessity therefor, but more frequently the necessity for their making is anticipated."

And in the same volume (*Inman* v. *Northern Pacific Railroad*) the same Secretary uses this language (pp. 95, 100):

"From the authorities cited the following rules are clearly deducible: First. Subject only to the control and power of disposition remaining in Congress, an anticipatory withdrawal, whether legislative or executive, during the time it remains in force, withholds the lands embraced therein from other appropriation or disposition, and prevents the acquisition of any legal or equitable title or right by settlement or entry in violation of such withdrawal."

Similar declarations may be found in almost every volume of the land decisions.

In the execution of this Northern Pacific land grant many withdrawals were made as called for from time to time along the line of general route and the Land Department has uniformly recognized the validity and effect of such withdrawals. In *Northern Pacific Railroad* v. *Pressey*, (2 L. Dec. 551,) it appeared that Pressey settled upon a tract within forty miles of the line of general route; that the lands at the time of his settlement were unsurveyed; that after survey he made application for a homestead entry, and it was held that he acquired no rights by his settlement, inasmuch as the land had been withdrawn by order of the Land Department, Secretary Teller saying (p. 553:)

"The settlement by Pressey upon the odd section was clearly in violation of the order of withdrawal, and he could acquire no rights or equities under such a settlement."

In *Northern Pacific Railroad* v. *Miller*, (7 L. Dec. 100,) a case in which the implied prohibition of the withdrawal of indemnity lands was first distinctly decided in the Land Department, Secretary Vilas said (p. 110) in reference to the withdrawal of lands within the place limits of the line of general route:

"Thus the action of the company and of the department co-operated to give official determination to the fact upon which the statute became applicable, both to withdraw the odd-numbered sections and to double the minimum price of the even-numbered sections, and both effects were formally recognized and declared. It cannot be doubted that, had no other action been taken before the line of the road for construction was definitely located, this action in regard to the line of the general route of 1870 must have remained continuously operative upon all lands within the limit of forty miles on either side of the line so established. So obvious is this, indeed, that from the mouth of the Walla Walla River, westwardly along the Columbia, that withdrawal remains to this day obligatory and operative by force of the statute and of that location.

"If authority be wanting to so manifest a proposition, it is found in the following language of the Supreme Court in the case already referred to."

In *McClure* v. *Northern Pacific Railroad*, (9 L. Dec. 155,) in an opinion by Secretary Noble, it was held that, "when the map of general route was filed, the withdrawal thereunder became at once effective, and reserved from general disposal the odd-numbered sections embraced therein."

In *Northern Pacific Railroad* v. *Collins*, (14 L. Dec. 484,) it was again decided by the same Secretary that "lands withdrawn for the benefit of said grant are not subject to settlement."

In *Central Pacific Railroad* v. *Beck*, (19 L. Dec. 100,) which was also a settlement upon unsurveyed land within the place limits of the general

route of the road, and in which a withdrawal had been ordered in accordance with the provisions of the act making the grant, Secretary Smith, sustaining the title of the railroad company, said (p. 103):

"I am clearly of the opinion that, after the withdrawal made upon the map of general route, no rights could be acquired adverse to the company by settlement upon the land, and that a settlement so made, even though it existed at the date of the filing of the map of definite location, would not serve to except the land settled upon from the operation of the grant to said company."

In the very last volume of the Land Decisions (vol. 30, p. 247,) in respect to the Southern Pacific Railroad Company, whose granting act contained a similar provision in reference to withdrawal on the filing of a map of general route, it was said by Secretary Hitchcock (p. 249):

"As between individual claimants and the company no claim could be predicated upon settlement or entry made after the filing of the map of general route, and as against such claims the grant in effect was operative from April 3, 1871, the date upon which the map of general route was filed."

So that from the beginning until the present time in construing this grant and others containing like provision there has been an unbroken line of decisions in the Land Department to the effect that a withdrawal made on the filing of the map of general route prevents any private claims attaching to the odd-numbered sections of land; and this whether the lands were surveyed or unsurveyed. Indeed, when Congress in the sixth section expressly declared that the lands "shall not be liable to sale or entry or pre-emption before or after they are surveyed," it would seem as though it had made every provision which language was capable of expressing to reserve from private entry for the benefit of the railroad company all odd-numbered sections, surveyed or unsurveyed, within the place limits of the line of general route.

I have already quoted from *Hewitt* v. *Schultz* in reference to the duty of following, in case of ambiguity, the construction given to a statute by the department charged with the execution of such statute. That doctrine was there applied although it appeared that the practice of the department during the building of the railroad had been one way and only changed after its completion, and the latter construction was upheld by this court as the ruling of the department. It was said (p. 156):

"It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to ovethrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-

numbered sections within the indemnity limits as defined by the act of Congress. If this were done it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed."

Now we have a case in which the ruling of the department has been unchanged from the commencement to the present time—a ruling which Secretary Vilas in 7 L. Dec, *supra*, called "so manifest a proposition," and it is wholly disregarded. The recent and temporary ruling of the Land Department was in the former case sustained in order, as was said, to protect the settler. Here the continuous practice of the department is disregarded and the patent issued by it to the railroad company is overthrown.

Still again, the company, by reason of section 6, believing that a withdrawal was to be made which should operate to its benefit, filed a map of general route, and a withdrawal was made of the odd-numbered sections of land. It is now held that such withdrawal did not withdraw the odd-numbered sections from entry and sale, but they remained still open to entry or purchase under the land laws. If that be the true construction, it follows that, whereas, if the company had filed no map of general route, no one would know where its line of road was to be until after it filed the map of definite location, and then the title would attach to all odd-numbered sections not burdened with existing claims. But by filing the map of general route, as it did eleven years before filing the map of definite location, it notified everybody of the proposed route, and so all settlers could take advantage of that knowledge and enter the odd-numbered sections contiguous thereto. Having this knowledge of where the line was to be located, of course settlers would come as near to that line as possible, in order to take advantage of the increased value coming from the construction of the road, and so taking advantage of the notice given would deplete the grant of lands which Congress had intended for the benefit of the company.

But this question has been definitely decided by this court. (*Buttz* v. *Northern Pacific Railroad Company*, 119 U. S. 55.) That was an action brought by the railroad company for the possession of a tract of land within forty miles of the general route as also of the line of definite location of plaintiff's road. The defendant entered upon the land in October, 1871, he at the time possessing all the qualifications of a pre-emptor and intending to obtain title by pre-emption. At that time the tract was, with others, in the occupation of the Sioux Indians. An agreement for the surrender by the Indians of all their rights was ratified on May 19, 1873. On May 26, 1873, the company filed in the Land Department its map of definite location. The defendant was therefore in occupation of the tract

with intent to pre-empt it for seven days after the rights of the Indians had ceased and before the filing of the map of definite location. So if the opinion of the court now announced had prevailed the defendant was entitled to hold that tract as against the company. On the 11th of August, 1873, he presented his application for entry, which was refused, and refused because it was within the forty-mile limit, as shown by a map of general route filed on February 21, 1872. This presents the precise question here involved. The unanimous opinion of the court sustained the action of the Land Department in refusing defendant's application to enter and confirmed the title of the railroad company. In the course of the opinion, by Mr. Justice Field, it was said (p. 72):

"When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. . . . Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable."

This decision, rendered seventeen years ago, has never hitherto been overruled. It was reaffirmed in *St. Paul & Pacific Railroad Company* v. *Northern Pacific Railroad Company*, (139 U. S. 1, 17, 18,) in which, speaking for a unanimous court, Mr. Justice Field said:

"Besides the withdrawal made by the Secretary of the Interior of lands within the forty-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road. . . .

After such withdrawal no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed."

In the opinion of the majority some later cases are referred to which are said to qualify the decision in *Buttz* v. *Northern Pacific Railroad Company.* But even the slightest attention to what was decided in those cases shows that in no manner do they qualify or limit that decision so far as it affects the present question. Before noticing those cases it is well to consider what was the purpose and effect of section 6. It was not a granting section. It did not purport to give title to anything to the company. Its whole scope and effect was to withdraw from sale, entry or pre-emption the odd-numbered sections in order that when the company filed its map of definite location it might secure those odd-numbered sections. The grant was made only by section 3 and attached to particular lands when the map of definite location was filed, but the proposition laid down in the Buttz case—and the proposition I am contending for here—is that this plaintiff in error could acquire nothing by his entry upon an odd-numbered section after the filing of the map of general route and the withdrawal; that the tract was therefore free from a claim of any kind when the map of definite location was filed, and so there was nothing to prevent the railroad company from receiving title.

Now the cases referred to are *St. Paul & Pacific* v. *Northern Pacific*, 139 U. S. 1; *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284; *Northern Pacific Railroad Company* v. *Sanders*, 166 U. S. 620; *Menotti* v. *Dillon*, 167 U. S. 703; *United States* v. *Oregon &c. Land Company*, 176 U. S. 28; *Wilcox* v. *Eastern Oregon Land Company*, Id. 51, and *Messinger* v. *Same*, Id. 58. After quoting from the opinions in some the court sums up by saying "the cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location was shown by an accepted map of its line." This is a proposition among the A., B., C.'s of public land law and needed no authorities in support thereof. But that proposition throws no light on the question as to the scope of the withdrawal given by section 6, and when the cases themselves are referred to not one of them conflicts with the proposition I have heretofore laid down. I have already shown what was decided in *St. Paul & Pacific* v. *Northern Pacific*, and need not repeat. In *United States* v. *Northern Pacific Railroad Company* it appeared that the Northern Pacific Railroad Company had attempted to locate a line from Portland directly north to Puget Sound, and in 1865 had filed a map of the general route thereof. Such a line was not within the authority granted by the act of Congress incorpor-

ating the Northern Pacific Railroad Company. On May 4, 1870, Congress made a land grant to the Oregon Central Railroad Company which included some of the lands within the forty-mile limits of the above-mentioned general route. On May 31, 1870, and twenty-seven days after the grant to the Oregon Central Railroad Company, Congress passed an act which authorized the Northern Pacific Company to construct a line from Portland to Puget Sound, with the privileges and grants provided for in the original act of incorporation, and it was held that the rights of the Oregon Central Railroad Company antedated and were superior to those of the Northern Pacific. First in time, first in right, is as to lands within place limits the settled rule of railroad land grants. What possible bearing this decision can have upon the case before us it is hard to conceive. In *Northern Pacific Railroad Company* v. *Sanders*, the lands in controversy were claimed as mineral lands, and applications for entry of them as such were pending in the Land Department. The court had held in *Barden* v. *Northern Pacific Railroad Company*, (154 U. S. 288,) that mineral lands did not pass under the grant to the railroad company, and that whether they were known or not known to be mineral lands at the time of the filing of the map of definite location was immaterial. Of course, it followed that whether they were known or not known at the time of the filing of the map of general route was also immaterial. The lands were of such a character as could not in any event pass to the railroad company any more than the even-numbered sections. They were not withdrawn by filing the map of general route; they did not pass by filing the map of definite location. The four remaining cases all proceeded upon the one proposition that the mere filing of the map of general route does not preclude Congress from making subsequently thereto and prior to the filing of the map of definite location—that is, prior to the time when title vested in the company—any other specific grant of the reserved lands. In other words, until the proposed grantee shall have done all that is necessary to vest title in it, there remains in Congress the power to make other disposition of the lands. But this was no new doctrine in the public land law. It was laid down in *Frisbie* v. *Whitney*, (9 Wall. 187;) in the well-known *Yosemite Valley case*, (15 Wall. 77,) and has been followed in many cases since. Of course, Congress could at any time before the filing of the map of definite location and while the title of the company was still inchoate, reserve any of the lands for military or other purposes or make a specific grant of them to individuals or corporations. But as said in *St. Paul & Pacific Railroad Company* v. *Northern Pacific Railroad Company*, *supra*, "after such withdrawal no interest in the lands granted can be acquired against the rights of the company, except by special legislative declaration," and in this case there has been no such legislative declaration.

But it is said that the case of the plaintiff in error is "placed on impregnable ground by the act of May 4, 1880, (chap. 89.)" I pass the proposition that this is a general act for the relief of settlers on public lands and the familiar doctrine that a general law passed after a special act does not interfere with the provisions of that act, provided there is room for the operation of both, and there is ample room for the operation of this act on public lands generally without interfering with the special provisions made in the Northern Pacific grant. But the act itself has no force whatever as applied to the present question. The provision is that one who is a settler on any of the public lands of the United States "with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he had settled under the pre-emption laws." If we turn to the pre-emption law we find (Revised Statutes, section 2264) that a person intending to pre-empt shall "within thirty days after the date of such settlement, file with the register of the proper district a written statement." That is, the pre-emptioner had thirty days after settlement within which to make his entry, while when we turn to the homestead law (Revised Statutes, section 2290) we find that a party seeking to homestead "shall, upon application to the register of the land office in which he is about to make such entry, make affidavit . . . that his entry is made for the purpose of actual settlement and cultivation." In other words, his right is initiated by the application to enter, and does not relate back to any settlement, and this statute simply gives him a right of thirty days' occupancy before making his application to enter. How such a statute, equalizing the rights of one seeking to make a homestead entry with those of one seeking to make pre-emption, can have any pertinency to the question before us passes my comprehension.

Again, several pages of the opinion are taken up with references to quotations from opinions in the Land Department as to the meaning of the term "occupied by homestead settlers." Here again I am unable to see the pertinency of these references. If there had been no withdrawal and the question arose as to the effect of plaintiff in error's occupancy of the land as against the rights of the company obtained by the map of definite location these authorities might be worth considering, but they throw no light upon the effect of the withdrawal, which is the question before us.

The fact that this tract was not surveyed at the time the plaintiff in error entered upon it nor until after the completion of the road is immaterial. By the terms of section 6 the prohibition against sale, entry or pre-emption extended to lands "before or after they are surveyed." Refer-

ence is made to several cases in which we held that the rights of a settler were not lost by the failure of the government to make a survey prior to his occupation. But those decisions were to the effect that the settler loses nothing by the neglect of the government. Here it is held that he gains something. If the survey had been completed before he commenced his occupation, and he could not then enter an odd-numbered section, surely he could not, in face of the prohibition of the section, enter the land after it had been surveyed. If instead of going upon lands that had been surveyed the settler chose to go into unsurveyed territory, he took his chances of placing his improvements upon an odd or even-numbered section. If he placed them upon what proved to be an odd-numbered section, he acquired no right as against the grant to the company. If he put them on what proved to be an even-numbered section, he would be compelled to pay the government double price. In the latter event does any one for a moment suppose that it would be an answer to the demand for a double price that the government had failed to make a survey before he chose to occupy the land and make improvements thereon? The construction placed by the majority not only takes from the railroad company the land which was granted to it, but deprived the government of that which it intended to obtain, a double price for the lands it reserved for sale.

Finally, I may say this decision clouds the title to all the lands granted to the railroad company. At the time the map of definite location was filed, as well as at the time the road was completed, there was not on the records of the Land Department a single word or mark which indicated to anybody that plaintiff in error was on the land or claiming it, or that the title of the railroad company was other than perfect. But because plaintiff in error was on the land it is held that the patent of the government to the railroad company conveyed to it no title, and that this occupant by parol testimony may show the fact of his occupancy and overthrow the record title. Yet this court unanimously held in *Northern Pacific Railroad* v. *Colburn*, (164 U. S. 383,) that mere occupation, unaccompanied by the filing of a claim in the land office, did not exclude a tract from the operation of the land grant. And that there was no oversight or lack of attention to this particular matter is shown by the fact that the United States promptly filed a brief of thirty-six pages, quoting the principal land decisions referred to in the opinion of the majority, and asked the court to reconsider its decision, which application was denied without dissent. Indeed, as appears from the authorities cited in that opinion, the conclusion was in accord with prior rulings, to the effect that there must be something of record in the Land Department to support the contention of an adverse right. That unanimous opinion of the court is put one side by the assertion that the land there in controversy had been surveyed while in this it

had not been. No distinction was made in the discussion between surveyed and unsurveyed lands, no suggestion that it affected the question in the slightest degree, and, as we have seen, the prohibition against sale, entry or pre-emption in section 6 extended to lands unsurveyed as well as surveyed. How can one say in respect to any tract claimed by the railroad company that it was not at the time of the filing of the map of definite location in the occupation of some one intending to pre-empt or homestead it? If such occupation is sufficient to avoid the patent of the United States, has the company sure title to any lands?

I think the judgment ought to be affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.